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No. 15475

United States
Court of Appeals
for the Ninth Circuit

E. V. PRENTICE MACHINERY CO., and PRENTICE MACHINERY WORKS, INC.,
Appellants,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

J. PIERRE KOLISCH,

Pacific Building,
Portland 4, Oregon,

MOE M. TONKON,

Public Service Building,
Portland 4, Oregon,

For Appellants.

HART, SPENCER, McCULLOCH
ROCKWOOD AND DAVIES,

CLEVELAND C. CORY,

MANLEY B. STRAYER,

1410 Yeon Building,
Portland, Oregon,

For Appellee.

In the United States District Court
for the District of Oregon

Civ. No. 7091

E. V. PRENTICE MACHINERY CO., and PRENTICE MACHINERY WORKS, INC.,
Plaintiffs,

vs.

ASSOCIATED PLYWOOD MILLS, INC., SKOOG ENGINEERING COMPANY, PER F. SKOOG, and OLAF SKOOG,
Defendants.

COMPLAINT

1. Plaintiff, E. V. Prentice Machinery Co., (hereinafter sometimes referred to as "Prentice"), is a partnership consisting of four brothers, Charles E., Thomas H., David V., and Edward A. Prentice, all of whom are residents of Oregon, with a principal place of business at 2303 N. Randolph Avenue, Portland, Oregon.

2. Defendant, Associated Plywood Mills, Inc., (hereinafter sometimes referred to as "Associated"), is a corporation of Washington, with its principal place of business at Eugene, Oregon.

3. On information and belief, Defendant, Skoog Engineering Company, is a partnership consisting of Defendants Per F. Skoog and Olaf Skoog, with a principal place of business at Olympia, Washington and does business in Oregon.

4. Defendants Per F. Skoog and Olaf Skoog reside in Olympia, Washington and do business in Oregon.

5. Plaintiff is engaged in interstate commerce by selling certain equipment (more particularly described below) in Oregon, Washington, California and elsewhere.

6. On information and belief, Defendant Associated sells plywood and other forest products in interstate commerce and leases certain equipment to users in Oregon, Washington, California and elsewhere.

7. On information and belief, Defendant Skoog Engineering Company, Per F. Skoog and Olaf Skoog are engaged in interstate commerce and are doing business in Oregon by manufacturing, leasing and servicing certain equipment in Oregon, Washington, California and elsewhere.

8. This action is brought under the provisions of Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731 (15 U.S.C. Sec. 15), entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes", known as the Clayton Act, for damages sustained by Plaintiff and in compensation for injuries suffered by Plaintiff in its business and property.

9. Prentice has been injured by reason of the unfair competitive practices of Defendants and by the unlawful acts of Defendants in restraint of in-

terstate commerce, and by reason of the commission by Defendants of other acts forbidden in Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. Sections 1 and 2), entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Act, and Section 3 of the Clayton Act (15 U.S.C. Section 14), all as hereinafter more particularly set forth.

10. The lumber industry is one of the great industries of this country, and particularly of the Western states, where it is a major industry. During the last 25 years, plywood panels made up of thin, so-called veneer sheets of wood joined to one another have become one of the most important manufactured lumber products. Plywood manufacturing mills are located throughout the country and are concentrated particularly in the South, Midwest and Northwest. The manufacture of plywood requires special equipment whose production and sale became a well recognized specialty.

11. Prentice's business of selling equipment to the plywood industry was started more than 35 years ago by the father of the Prentice brothers, Edward V. Prentice, but was temporarily interrupted by his death in 1943, until 1947 when Plaintiff partnership was organized. Plaintiff markets a complete line of plywood making equipment, including an automatic veneer patching machine which is employed to replace defective portions, such as knot holes, in veneer sheets.

12. On information and belief, Defendant, Associated, is one of the larger manufacturers of plywood, and has a net worth in excess of $13,000,000.00. It was formed around 1947 by a merger of several plywood makers, including Olympia Plywood Machinery Co., (hereinafter sometimes referred to as Olympia) and Olympia Veneer Co. who transferred to Associated all assets and liabilities, including patents.

13. Defendant Per F. Skoog had at one time been employed by Olympia and had assigned (Exhibit A hereto attached) all his rights under U. S. Letters Patents No. 2,336,704, entitled "Method of Patching Veneer Sheets" (Exhibit B hereto attached) and No. 2,336,703, entitled "Means for Patching Veneer Sheets" (Exhibit C hereto attached), hereinafter referred to as "the Skoog Patents", to Olympia with whom he had entered into an agreement (Exhibit D hereto attached) relative his inventions on veneer patching.

14. Olympia manufactured and leased, under the supervision of Per F. Skoog, automatic veneer patching machines under the Skoog inventions, (hereinafter sometimes referred to as "Skoog machines"). In 1947, Associated, as successor to Olympia, entered into an agreement with Skoog (Exhibit E hereto attached) and The Skoog Engineering Company, providing for the manufacturing, leasing and servicing of the Skoog machines.

15. Beginning shortly before the second world war, around 1938 and 1939, plywood manufacturers

in this country, and particularly in the Northwest, took an increasing interest in the patching of veneer sheets employed in making up plywood panels. Previously, because of the plentiful supply of good, cheap timber, most plywood manufacturers did not patch defective material. With the advent of the war, the great depletion of our timber resources, and the scarcity of manpower, it became increasingly important to utilize veneer sheets having flaws, and plywood manufacturers sought satisfactory machinery for patching such sheets in order to minimize labor costs.

16. On or about the time that Per F. Skoog made the alleged inventions, which resulted in the Skoog patents, he and Olympia conspired to monopolize the business in automatic veneer patching machines. Part of their plan was to lease rather than sell Skoog machines to plywood manufacturers. Each Skoog machine was rented under a separate lease in which, although the lessee received no rights under the Skoog inventions and acquired only the right to use the leased machine, nonetheless, defendants exacted the following tying clauses enabling them to establish the unlawful monopoly herein complained of:

(a) The lessee agreed not to infringe in any manner on the lessor's purportedly exclusive rights to manufacture and sell Skoog machines; and the lessee agreed neither to make, nor to buy, nor to use any machines competing with the Skoog machine nor to practice any methods competing with

the Skoog method of patching veneer. (Exhibit F hereto attached.)

(b) After December 14, 1943, when the Skoog patents issued, the lease agreements specified the patents by numbers and provided that the lessee would neither make, nor buy, nor use any machines competing with the Skoog machines, nor practice any methods competing with the Skoog method of patching veneer, or infringe the Skoog patents. After Defendant Associated was formed, it ratified and continued the same course of conduct with Per F. Skoog and the Skoog Engineering Company, as had its predecessor Olympia. (Exhibits G, H, and I hereto attached.) At some date, presently unknown to Plaintiff, Defendant Olaf Skoog became associated with Per F. Skoog and Skoog Engineering Company, and conspired with and aided and abetted said other Defendants in the illegal course of conduct here complained of.

(c) By means of the illegal tying clauses described in paragraphs a and b supra, Defendants eliminated from the market a substantial part of Prentice's prospective customers for automatic veneer patching machines.

(d) The illegal tying clauses described in paragraphs a and b supra aided Defendants in establishing a monopoly in this country in automatic veneer patching machines and methods.

17. The two Skoog patents readily lent themselves to Defendants' illegal monopoly of the automatic veneer patching business. United States Let-

ters Patent No. 2,336,704 purported to cover a machine for automatically patching veneer sheets, and United States Letters Patent No. 2,336,703 purported to cover all practical methods of patching veneer, whether done by hand, by the Skoog machine, or by any other machine. The tying clauses of the lease agreements referred to in paragraph 16, supra, barred Defendants' lessees from doing business in automatic patching machines with Prentice or any other competitors of Defendants. As a consequence, Defendants established, beginning in 1941, a monopoly in automatic veneer patching machines in this country.

18. Prentice, in seeking to add to its line of machinery an automatic veneer patching machine, learned in 1950 that the Raimann Company of Freiburg, Germany, had been making and selling such machines throughout the world ever since 1936. Before the end of 1950 Prentice obtained the right to sell said machine in the Pacific Coast territory and started offering for sale said Raimann automatic veneer patching machine in competition with the Skoog machine.

19. Despite Defendants' unlawful restrictive agreements, bolstered by invalid patents, Prentice was successful in selling some Raimann machines and established by 1952 a profitable business in the sale of Raimann machines, representing a substantial portion of the total business done by Plaintiff.

20. In 1952 Defendants, in order to eliminate Prentice as a competitor, caused the sending of let-

ters to twenty-nine out of thirty-one of Prentice's customers, notifying them that the Raimann machines and their use constituted infringements of the Skoog patents, and that unless use of the machines was stopped and payment for past infringement made, said customers would be promptly sued for patent infringement. (Exhibit J, July 25, 1952 letter hereto attached.)

21. Defendants did not send any letters, such as those referred to in paragraph 20 above, nor any other notice of alleged patent infringement, either to Prentice or the Raimann Company. Prentice learned of Defendants' contention of patent infringement when customers demanded that Prentice protect them from the threatened suits as specified in paragraph 20, supra.

22. Defendants willfully and maliciously sent out said letters (Exhibit J) to Prentice's customers with the intended result that the threats of patent infringement would stop sales by Prentice of Raimann machines and would involve Prentice in controversies with customers who had bought such machines.

23. Defendants had asserted said Skoog patents although they knew, or should have known, that the patents were invalid, and that there was no probable cause for the charge of patent infringement, Defendants' intent and purpose having been the elimination of Prentice as a competitor.

24. The intended and actual result of Defend-

ants' threats against Prentice's customers was that Prentice was unable to sell Raimann machines and the sale by Prentice of other machinery and equipment was materially curtailed.

25. In a partial attempt to protect itself and its customers against such unlawful and unfair acts of competition, Prentice commenced, on August 8, 1952, a declaratory judgment action in this Court against Associated to have the Skoog patents declared invalid, not infringed by the Raimann machine, and for an injunction restraining Associated from suing or threatening Prentice's customers with suits for patent infringement.

26. On August 15, 1952, after service on Associated of the complaint, referred to in paragraph 25 above, Associated's attorneys sent additional letters to Prentice's customers inquiring as to whether the alleged infringing activities had ceased. The purpose and result of these letters was further to intimidate Prentice's customers and damage Plaintiff's business.

27. On August 18, 1952, as a further step in its plan to destroy Prentice's business, Associated started a suit alleging infringement of the Skoog patents in the United States District Court for the Western District of Washington, Northern Division, against a customer of Prentice, The Buffelen Manufacturing Company. Subsequently, Prentice was successful in enjoining prosecution of the Washington suit until disposition of the Oregon action, but not without first having been put to the

time, trouble and expense of the necessary proceedings.

28. On August 28, Associated filed its answer and cross complaint to Prentice's complaint in the Oregon action and demanded damages for infringement of the Skoog patents and for unfair competition in the sum of at least $50,000.00, to be trebled because of the allegedly willful and wanton character of Prentice's infringement. Associated demanded and was granted a jury trial on the issues of fact raised by its answer and cross complaint.

29. Associated willfully and maliciously charged Prentice with infringement of the Skoog patents even though it knew, or should have known, that these patents were invalid and not infringed. At the trial, Associated made no offer or attempt to prove the charges of unfair competition it had leveled against Prentice.

30. On November 24, 1952, after the trial of said declaratory judgment action and cross complaint, the jury returned a verdict for Prentice and found that the Skoog patents were invalid, (a copy of the jury verdict hereto attached as Exhibit K) and on April 17, 1953, this Court per the Honorable Gus J. Solomon held that Prentice was entitled to attorney fees in the patent infringement action, because Associated was guilty of unfairness and inequitable conduct in its dealings with Prentice (copy of Judge Solomon's opinion attached hereto as Exhibit L).

31. On May 8, 1953 a judgment was entered

holding the Skoog patents invalid and awarding Prentice attorney fees. No appeal was taken from this judgment and on June 10 Associated satisfied the judgment.

32. The hereinbefore alleged acts, leases, agreements, monopoly, combinations and conspiracies have damaged Prentice's business, its reputation and good will, alienated its customers, wrongfully slandered its product, wrongfully interfered with and interrupted its contracts and negotiations for contracts with its customers, and the defense of the inequitably pressed patent infringement action has cost Prentice sums for which it has not been compensated.

Wherefore Plaintiff Demands:

That pursuant to the provisions of Section 4 of the Clayton Act, (15 U.S.C. Sec. 15) Plaintiff have judgment against the Defendants and each of them in the amount of $1,500,000.00, together with an additional sum equal three-fold the actual damages sustained by reason of defendants' violation of the anti-trust laws, attorneys' fees, and cost of suit.

WILBUR, MAUTZ, SOUTHER
& SPAULDING,

/s/ By WILLIAM H. KINSEY,

J. PIERRE KOLISCH,

/s/ J. PIERRE KOLISCH,

Attorneys for Plaintiff.

PLAINTIFFS' EXHIBIT A
ASSIGNMENT

Whereas, I, Per F. Skoog, of Olympia, county of Thurston, and State of Washington, have invented certain improvements in

Method and Means For Patching Veneer Sheets for which I have made application for Letters Patent of the United States, Serial No. 412,808, filed September 29, 1941, and

Method and Means For Patching Veneer Sheets for which I have made application for Letters Patent of the United States, Serial No. 389,533, filed April 21, 1941; and

Whereas, Olympia Plywood Machinery Corporation of Olympia, County of Thurston, and State of Washington, is desirous of acquiring an interest therein:

Now Therefore, in consideration of one Dollar, the receipt of which is hereby acknowledged, I, Per F. Skoog, by these presents do sell, assign, and transfer unto Olympia Plywood Machinery Corporation the full and exclusive right for the territory of the United States of America and for all foreign countries in and to the said inventions, as described in the application more fully identified above, filed preparatory to obtaining letters patent of the United States therefor; said inventions, applications, and letters patent to be held and enjoyed by the said Olympia Plywood Machinery Corporation, for its own use and behoof, and for its legal repre-

sentatives, to the full end of the term for which said letters patent may be granted, as fully and entirely as the same would have been held by me had this assignment and sale not been made.

In Witness Whereof, I have hereunto set my hand and seal this 30th day of October, 1943.

/s/ Per F. Skoog

State of Washington,
County of Thurston—ss.

On this 30th day of October, 1943, before me personally appeared Per F. Skoog, to me known to be the person described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the use and purposes therein described.

[Seal] /s/ Olga E. Carlson,
Notary Public in and for the State of Washington,
Residing at Olympia.

Recorded U. S. Patent Office, Nov. 13, 1943, Conway P. Coe, Commissioner of Patents, Liber Q197, Page 369.

Note:

Pages 16 - 28 are on card 2.

the arm into position for cutting. On its advanced or forward end the carrier or bar 110 carrying a clean-out bar or cross-head 120 which travels across the upper face of the member 42 and the member 40 and will wipe therefrom any debris from the veneer sheet cutting operation that may be deposited thereon. Spring 122 operates upwardly against the under side of the plug blank as it is being fed to the carrier bar to the cutting position and holds it against dislodgement during that travel.

To assist in cleaning out any debris that may remain in the carrier arm 110 after a blank has been cut into the proper shape for a patch, I employ the upwardly urged spring leaf 122 that may best be seen in Figures 1 and 13 and which rides in the slot 118 and the opening 116 and will deflect downwardly any such debris therein.

In the showings of the Figures 9 through 14, are illustrated, the various elements of the invention and the steps of the method by which the invention is practiced. In the Figure 9 I have shown fragments of the essential portions of the mechanism and this mechanism is shown in the "at rest" position. In this position the veneer sheet 28 is inserted between the member 60 and the clamping mechanism positioned thereabove so that the marred area 28a that is to be cut from the sheet 28 is within the effective cutting area of the knife 80.

In Figure 10 the first mechanical movement of the device is illustrated as having occurred. In that case the sheet 28 is clamped on the die 60 by means of the clamp mechanism 70 which is extruded downwardly from its upwardly supported position on the spring 74, through the urgence of air which has been introduced into chamber 78 against the upper face of the member 70 through the tube 76. When air is supplied to the tube 76 the member 70 seats firmly so that its foot 71 presses against the upper face of the sheet 28 and holds it tightly in place.

The next step in the method is illustrated in Figure 11 in which instance the knife 80 and the hold down member 88 have been forced downwardly under the urgence of air applied to the upper surface of the diaphragm 88 and also into the chamber 102 against the piston 100.

The thin knife edge of the member 80 shears out the marred portion 28a of the sheet 28 that is to be cut away and carries it downwardly. The debris is removed from within the knife by means of the foot 88 stripping it therefrom as the member 80 is withdrawn. This latter operation can be clearly seen in Figure 12 in which instance it will be noted that the clamp member 70 is still firmly holding the sheet 28 against the die 60. The debris or marred area 28a that has been cut away is now lying on the upper surface of the upwardly movable ram member 46, from which it is to be removed by the operation of the laterally movable cross-head 120 on the carrier arm 110. Arm 110 moves across the upper face of member 46, between members 42 and 60, so that, as will be seen in Figure 13, the debris 28a is kicked out of the mechanism and falls in a suitable manner for disposal.

At the same time, through the movement of the carrier arm across the member 46, a patching blank 34 is carried into position onto the upper face of the member 42 under the hold-down shoe 88. When a patch 34 is properly positioned under the die 60 the upwardly moving plunger 46 rises under the urgence of air supplied to the under side of the diaphragm 54 and the plug blank 34 is securely clamped between the ram and member 60 as it passes against the lower cutting edge of the die member 60 and through the opening or passage 62 therein. The cutting operation will bend certain of the wood fibers along the cut edge that will expand when freed from the die block to grip the inner edges of the opening in the veneer sheet. The cut plug patch is held under compression from top and bottom between the members 60 and the lower ram member 46 all of the time that it passes through the opening 62 in the cutting die 60. The plug and its bent fibers along the edge are held against edgewise expansion by the walls of the opening or passage 62 of the member 60 so that the patch plug has no opportunity to expand larger than its cut size. This compression is maintained all of the time until the plug shown in Figure 14 is brought into position in the member 28 whereupon the plug body and edge fibers are free to expand in the opening therein.

By means of suitable timing mechanism, these various steps hereinabove described are carried on sequentially with split-second timing where necessary. The details of such control mechanism is not shown as many types would perform suitably such simple functions.

The moment that the plug is placed in the opening as shown in Figure 14, the shoe 88 rises and the ram 46 is forced downwardly by the action of the spring 51 or by means of air that may be supplied to the upper side of the diaphragm 54. The cutting and patching mechanism returns to the "at rest" position as shown in Figure 9. Whereupon the carrier arm 110 retracts, from the position of Figure 5A to that of Figure 5, and any debris 34a that may be on the upper face of the member 42 is withdrawn, to the left in the showing, and is stripped from the slotted carrier arm 110 by means of the leaf spring 122 which extends into the slot 118. In Figure 1 this last mentioned operation may be seen with the debris shown as falling out of the carrier arm and downwardly for disposal by gravity or otherwise.

The upper and lower diaphragms 64 and 88, are ordinarily controlled by means of a supply of air or other fluid under pressure which passes through the valve mechanisms 58 and 89 respectively. These valve mechanisms may be of the solenoid operated type, and an electrical controller means (not shown in the drawings) will control the opening and closing of these valves, permitting the influx or exhaust of air to the diaphragms. In such cases where there is no direct supply of air furnished to the diaphragms to return them to the original or "at rest" position, this function is performed by the springs 51 and 87. Air may freely flow in or out through the members 80 and 94 so that exhaust may be provided to break the vacuum on retracting movement. The supply of air pressure to the chamber 102 to the valve 103 is controlled by the electrically operated mechanism 103a indicated in Figure 1.

It will be noted that during practically all of the operations of my invention in cutting and patching a sheet of veneer that the holding or clamping mechanism is constantly maintaining the sheet against the die to hold it in position during the punch cutting operation, as well as during the patching cycle.

The clamp means is so constructed that it surrounds the punch and also the area to be punched-cut and prevents breaking or cracking of the wood during the punching cycle. This is extremely important for, in fibrous wood as well as in brittle

sheets, if the material being cut were not firmly held it would tend to splinter and to crack and to otherwise destroy itself when the knife is brought downwardly to perform its shearing function. It is to be noted that the important operation of cutting the required area from a sheet of veneer stock is performed by a knife that moves and cooperates with a fixed die and that this cutting operation is not merely a punching or stamping operation but also a shearing operation. The former is impractical because of the large sheet being cut and because the material within the cut is usually weak and will not stand punching. The converse is true when the plug patch blank is cut to form a patching plug for in that case the stock is sufficiently strong to be forced upwardly against a fixed die due to the operation of the vertically rising plunger.

While I have shown as a preferred form of my invention, the use of air-operated diaphragms and piston mechanisms for the actuation of the various mechanical elements of my device it is to be understood that these form no important part of my invention as the combination of elements forming the cutting mechanism is the heart and soul of the invention.

I claim:

1. In the patching of veneer sheets having a marred area, the method which comprises: clamping the veneer sheet so that the area surrounding the portion to be cut is rigidly held, punch cutting the marred area from said sheet and disposing of the debris removed thereby, sequentially clamping a punched blank and cutting it to the size and shape of the punch cut area, inserting said cut plug in said opening in the sheet without having unclamped the sheet while simultaneously maintaining said plug pressed against buckling and edgewise expansion, and finally unclamping said sheet.

2. In the patching of veneer sheets having a marred area, the method which comprises: clamping the veneer sheet so that the area surrounding the portion to be cut is rigidly held, punch cutting the marred area from said sheet and disposing of the debris removed thereby, all the while continuing to maintain said sheet firmly clamped, sequentially clamping a plug blank and cutting it to the size and shape of the punch cut area, and inserting said cut plug in said opening in the sheet without having unclamped the sheet while simultaneously maintaining said plug compressed against buckling and edgewise expansion.

3. In the patching of veneer sheets having a marred area, the method which comprises: clamping said sheet so that the area surrounding the portion to be cut is rigidly held, punch cutting the marred area from said sheet and disposing of the debris removed thereby, sequentially clamping a plug blank and cutting it to the size and shape of the punch cut area so that the cut edge has bent fibers, and inserting said cut plug in said opening in the sheet without having unclamped the sheet while simultaneously maintaining said plug compressed against buckling and edgewise expansion.

4. The method of inlaying sheet material, which method comprises: punch cutting a sheet to be inlaid while simultaneously and thereafter, until the inlay operation is complete, maintaining the area surrounding the opening free from distortion; clamping an inlay blank on opposite faces and cutting an inlay to the size and shape of the punch-cut opening; simultaneous with the cutting, securing the inlay by restraining pressure exerted transversely of its axis while maintaining the clamping pressure on the opposite inlay faces; and inserting the inlay into the punch cut opening.

PER F. SKOOG.

PLAINTIFFS' EXHIBIT D

AGREEMENT

This Agreement made this 5th day of May, 1942, by and between the Olympia Plywood Machinery Corporation, hereinafter called the Company, and Per F. Skoog, hereinafter called Skoog.

Witnesseth:

That Whereas, the said Skoog has invented a patching machine for wood veneers and plywood, hereinafter sometimes referred to as the "machine" or the "invention", on which invention application for Letters Patent has been filed in the United States Patent Office under #389,533; and

Whereas, the Company has been authorized to engage and is engaging in the manufacture of said machine; and

Whereas, the Company is also licensing the use of, or leasing, said machine to others under license or lease agreements; and

Whereas, the parties desire to establish in writing their respective rights with reference to the manufacture, use and sale of said invention;

Now, Therefore, in consideration of the premises and of other good and valuable considerations, receipt whereof is hereby mutually acknowledged, and in consideration of the mutual covenants and agreements hereinafter made, it is hereby agreed as follows:

1. Skoog will assign and has simultaneously herewith assigned to the Olympia Veneer Company all his rights in and to the said invention and all

improvements thereon, and title to the said invention and said improvements and to the patent or patents thereon when issued shall by assignment from the Olympia Veneer Company vest in the Company; it being understood that the Olympia Veneer Company will assign all of said rights to the Company, subject to all the terms and conditions of this agreement.

2. The Company agrees to pay to the said Skeog the sum of Fifty Dollars ($50.00) per month for each machine which is manufactured by the Company and placed in the possession of any other person, firm or corporation, for use by it under any license or lease agreement, the said monthly payments to commence in the month following that in which said machine is delivered to such other person, firm or corporation, and to continue so long as such machine remains in the possession of such other person, firm or corporation, and without regard to whether the Company itself collects any sum from such other person, firm or corporation for the use of said machine. It is understood and agreed, however, that no monthly payment is to be required of the Company for any machine placed in the possession of or used by the Olympia Veneer Company or any of its wholly owned or controlled subsidiary companies.

3. Within thirty days from the date of this agreement the Company agrees to make payment to the said Skoog for all machines heretofore manufactured by the Company and placed in the possession of any person, firm or corporation other than

said Olympia Veneer Company or any of its wholly owned or controlled subsidiary companies, such payment to be calculated at the rate of Fifty Dollars ($50.00) per month for the period during which such machine has been in the possession of such person, firm or corporation prior to May 1, 1942. In the event that the machine has been in use for some portion of any calendar month less than the whole thereof, the amount payable to the said Skoog shall be pro rated at the rate of Fifty Dollars ($50.00) per month in proportion to the partial monthly period for which such machine has been in use.

4. The Company agrees that, beginning with the month of May 1942, it will pay to the said Skoog, on or before the 25th day of each month, the monthly payments of Fifty Dollars ($50.00) each on all machines for which such liability accrued during the preceding calendar month. Payment with respect to any machine which was used for less than the whole of the preceding calendar month shall be pro rated at the rate of Fifty Dollars ($50.00) per month in proportion to the period during which the same was in the possession of any person, firm or corporation other than said Olympia Veneer Company and any of its wholly owned or controlled subsidiary companies. In making any payment covered by this or the preceding paragraph hereof, the Company shall at the same time furnish to the said Skoog a written statement showing the method of computation thereof, including the name of the person, firm or corporation in

whose possession said machine was during the preceding calendar month, and the period during such preceding calendar month in which such possession existed.

5. Throughout the life of this agreement the said Skoog shall have the right at all reasonable times, either in person or by representative duly authorized in writing, to inspect all of the books and records of the Company relating to said invention and the use thereof by any other person, firm or corporation.

6. In the event that any litigation should arise with respect to said invention, or any patent application or patent based thereon, the Company shall have the exclusive control thereof and the right to direct the maintenance or defense thereof; but the said Skoog agrees, on request, at all times to furnish such reasonable assistance in an advisory way as may be requested by the Company with reference to any such litigation; Provided, however, that if any action is brought by any person seeking to attack the validity of any patent applied for or issued upon such invention, or in the event that any patent issued upon said invention should be infringed to the extent of seriously impairing the value thereof, and the Company should be unwilling to defend such action attacking said patent, or to prosecute an action for such infringement, the said Skoog shall have the right to terminate this contract if he so desires, and all rights of the Company hereunder shall thereupon cease, and it shall thereupon retransfer all of its interest in said invention and in

any patent applied for or issued thereon to the said Skoog.

7. This contract shall include any and all improvements made by the said Skoog upon said invention without obligating the Company to make any additional payments to the said Skoog.

8. This contract shall not be assigned by the Company without the consent, in writing, of the said Skoog; nor shall the Company, without the consent in writing of said Skoog, sell any patent or patents issued upon said invention or any improvement thereon, or license any other person to manufacture or sell the said invention or any improvement thereon.

9. This agreement shall remain in force from the date hereof and until all patent or patents issued with respect to said invention, or any improvement thereon, shall expire.

10. This agreement shall bind the personal representatives, successors and assigns of the parties hereto.

In Witness Whereof, the parties hereto have hereunto affixed their signatures on the day and year first above written.

Olympia Plywood Machinery
Corporation,

/s/ By Arnold Koutonen,
Pres.,
/s/ (Illegible)

PLAINTIFFS' EXHIBIT E

This Contract and Agreement, made this 26th day of February, 1947, by and between Associated Plywood Mills, Inc., a corporation, hereinafter called the "Company", and Per F. Skoog, hereinafter called "Skoog."

Witnesseth:

That heretofore and on the 5th day of May, 1942, the Olympia Plywood Machinery Corporation entered into a contract with reference to a machine, or invention, application for Letters Patent on which had been filed in the United States Patent Office under No. 389533 (and which invention has subsequently been patented and bears United States Patent Nos. 2336703 and 2336704, and Dominion of Canada Patent No. 421291), which contract is before the parties to this agreement.

It is further understood by the parties to this contract that the Associated Plywood Mills, Inc., is the legal successor of the Olympia Plywood Machinery Corporation, and is the owner of the contract, and all rights thereunder referred to above, and such ownership is hereby acknowledged by Skoog.

It is within the contemplation of the parties to this contract that the former contract shall constitute an underlying contract which shall continue in force, except insofar as modified by this contract, and in case of the termination of this contract on the part of either or both parties the former contract shall continue in force in all particulars.

It is therefore agreed between the parties hereto that the Company hereby appoints Skoog as its agent for the manufacture of the Skoog Patching Machine, to manufacture and lease the same, and in all respects to carry on the business of manufacturing and servicing of the Skoog Patching Machine.

It is understood and agreed that the customer takes care of and maintains the machine insofar as ordinary servicing (not attributable to faulty workmanship in the machine itself) is concerned, and that Skoog shall finance the cost connected with office expenses and will keep one service man on his payroll whose compensation, so far as possible, shall be collected from the customer, the remainder to be paid by Skoog.

It is agreed between the parties that Skoog shall receive from the Company expense allowance for handling of this business of $25.00 per machine per month; and a royalty of $50.00 per machine per month; in each instance to be deducted by Skoog from rentals collected by him on the particular machine rented, and the Company shall be under no other or further obligation for servicing or royalties.

The appointment by the Associated Plywood Mills, Inc., of Skoog is intended to give him authority to handle the business, to bill for and collect all rentals for machines placed, to solicit new business, handle and collect for servicing, where possible, make and furnish parts for sale as required, make

all rental collections and to keep complete records thereof, which records shall be open to the inspection of the Company at all times, and to make monthly statements, accompanied by remittances for all rentals, showing deductions for royalties and the $25.00 service expense allowance.

It is understood and agreed that the company shall finance the venture so far as the manufacture of new machines is concerned, and the repair and reconditioning of machines not rented.

In case the parties hereto agree to make and lease other and further machines than those now manufactured, Skoog shall make written application for an appropriation, and make a statement of costs, and make an accounting for such manufacture to the Company.

The Company shall make an inventory and turn over to Skoog all parts now in stock, said parts to be paid for by Skoog on such terms as are mutually satisfactory. The making and selling of parts will be the private business of Skoog.

The rentals at which the machines shall be placed with customers shall be the subject of an agreement from time to time between Skoog and the Company.

The Company acknowledges an indebtedness to Skoog at this time of $1,075.00 for the month of January, 1947, and $1,075.00 for the month of February, 1947, which amounts shall be paid coincidentally with the execution hereof.

Either party to this contract upon three months'

notice in writing, can cancel the same and call for an accounting.

[Seal] Associated Plywood Mills, Inc.,

/s/ By Leonard Nystrom,
/s/ By Lynn Norman,

Per F. Skoog,
/s/ Per F. Skoog.

State of Oregon,
County of Lane—ss.

On this 26th day of February 1947 before me, the undersigned, a notary public for said County and State, personally appeared the within named Per F. Skoog, personally known to me to be the individual described in, and who executed the within instrument, and acknowledged to me that he executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and notarial seal the day and year first above given.

/s/ Veva M. Kocher,
Notary Public in and for the State of Oregon, residing at Eugene. My commission expires Dec. 6, 1948.

State of Oregon,
County of Lane—ss.

On this 26th day of February 1947, before me, a notary public in and for said county and state, appeared Leonard Nystrom and Lynn Norman, to me

personally known, who, being each duly sworn, did say that they are the President and Secretary, respectively, of the Associated Plywood Mills, Incorporated; that the seal affixed to the within Instrument is the Corporate Seal; and the Instrument was signed and sealed on behalf of said Corporation by authority of its Board of Directors.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal the day and year first above given.

[Seal] /s/ Veva M. Kocher,
Notary Public in and for the State of Oregon, residing at Eugene. My commission expires Dec. 6, 1948.

PLAINTIFFS' EXHIBIT F
LEASE

This Agreement of Lease is made and executed this 5th day of May, 1943, between Olympia Plywood Machinery Corporation, a corporation organized under the laws of the State of Washington, hereinafter called the lessor, and Buffelen Lumber & Manufacturing Co., a corporation organized under the laws of the State of Washington, hereinafter called the lessee,

Witnesseth:

That the lessor under the terms and conditions herein set forth hereby leases and lets to the lessee that certain machine with accessories known as Skoog Patching Machine.

This machine is to be used by the lessee in the

operation of its plywood plant at Tacoma in the State of Washington.

This lease is for a period of two years.

As rental for said machine for said two year period the lessee agrees to pay the said lessor the sum of Six Thousand Dollars ($6,000.00), which rental shall be paid in twenty-four equal monthly instalments beginning with the month of June, 1943.

Said lessor agrees as soon as possible to deliver said machine to the lessee f.o.b. the lessor's plant in Olympia, Washington. The transportation of said machine from lessor's plant at Olympia, Washington to the plant of the lessee where same is to be used shall be at the sole risk and expense of the lessee.

Said lessee shall install said machine solely at its own expense; provided, however, that such installation shall be under the supervision of the lessor's agents, the expense of the lessor's agents to be paid by the lessor.

The two year term of this lease shall commence on the first day of the month following that in which said machine has been put in operation, and on the first day of such month the lessee shall pay to the lessor the first monthly installment of said rent in the sum of Two Hundred Fifty Dollars ($250.00). Thereafter on the first day of each succeeding month a like sum of Two Hundred Fifty Dollars ($250.00) shall be paid the lessor by the lessee during said entire two year term. The said two year term above provided for shall be extended for the term of one year unless the lessee thirty days

before the expiration of said two year term shall notify the lessor in writing that it desires to terminate said lease at the end of said two year term. In the event said lease is extended for said additional year, the lessee agrees to pay the lessor for said one year extension the sum of Fifteen Hundred Dollars ($1500.00), which rental shall be paid in twelve (12) equal monthly installments of One Hundred Twenty-five Dollars ($125.00) each. In the absence of like written notice to the lessor by the lessee before the expiration of said additional term of one year, said lease shall be extended from year to year at the same rate, namely Fifteen Hundred Dollars ($1500.00) per year, payable in twelve equal monthly installments of One Hundred Twenty-five Dollars ($125.00) each.

The lessor warrants that it is the owner of said property and has the right to make this lease.

The lessee agrees to keep said machine safely, to operate the same with reasonable care, and maintain the same in good repair. The lessee shall not have the right to assign this lease or any interest therein, nor to pledge the same, nor to loan the machine herein described or any part thereof to any other person or corporation, nor to change the location thereof as herein provided, without first receiving the written consent of the lessor to such assignment, pledging, leasing, or loaning.

The said lessee likewise agrees to keep said machine free from liens of every kind and character.

It is specifically agreed between the parties that that this is a rental contract only, that it is not a

sale or conditional sale, and that the title to the said machine and the accessories and all additions thereto shall remain in the lessor, free from all claims of the lessee or other persons excepting as disclosed herein.

It is understood by the parties that a patent on said machine has heretofore been applied for, and said lessee agrees to refrain from in any manner infringing upon lessor's rights to manufacture and sell such machine and agrees not to manufacture, own or operate any machine other than those which it may lease from the lessor, which machines have the same purpose and do the same work as that herein described.

The lessee agrees during the term of this lease and all extensions thereof to pay all taxes and assessments that may be levied against said leased machine and accessories and further agrees at lessee's expense to keep the same insured to the extent of not less than $6,000.00 against loss by fire or other cause, with loss first payable to the lessor as its interest shall appear and thereafter to the lessee. During the life of this lease such insurance policies, together with receipts showing payment of premiums thereon, shall be delivered to and kept in the possession of the lessor.

The lessee hereby accepts said machine and agrees to hold the lessor harmless from all liability or claims for damage to the said lessee, its agents, officers or employees, or to any other person or corporation, whether said liability or claim for injuries or damage results from breakage, fire or other casu-

alty or results from the operation of said machine.

In the event the lessee fails to pay any installment of rent at the times and in the manner herein provided and becomes in default thereon for thirty days, the lessor may at its option without notice terminate this lease, enter upon the lessee's premises and repossess itself of said machine and accessories. The said lessor shall likewise have the right at its option to cancel this lease on account of the lessee's failure to keep and perform any other provision hereof; provided, however, that the lessor shall give the lessee written notice of its failure to perform this lease and shall exercise its right to cancel the same only in the event that the lessee fails for thirty days after the receipt of such notice to completely fulfill its obligations under this lease.

On the expiration of said two year term or any extension of this lease, the lessee agrees to dismantle said machine and deliver the same to the lessor in as good condition as the same is now in, reasonable wear excepted.

Time is of the essence of this lease.

This contract of lease is binding upon the parties hereto, their successors and assigns.

This lease is executed in duplicate on the day and year first above written.

Olympia Plywood Machinery
Corporation,
/s/ By Arnold Koutonen,
Agent.
Lessor.

Buffelen Lumber & Manufacturing Co.,
/s/ By Frank S. Neal,
President.

Attest:
/s/ J. P. Simpson,
Secretary.
Lessee.

SUPPLEMENTAL AGREEMENT

This Agreement is entered into this 5th day of May, 1943 between the Olympia Plywood Machinery Corporation, a corporation organized under the laws of the State of Washington, hereinafter called the lessor, and Buffelen Lumber & Manufacturing Co., a corporation organized under the laws of the State of Washington, hereinafter called the lessee, Witnesseth:

That Whereas, the lessor entered into a lease in writing with the lessee dated May 5, 1943, by which the lessee has leased from the lessor a certain machine described as the "Skoog Patching Machine" under the terms and conditions of said written lease.

Now, Therefore, it is agreed between the parties hereto that said lease of May 5, 1943 shall be amended in the following respects only:

1. Said lease of May 5, 1943 is for a period of two years. It is agreed that in the event that the plant in which the said lessee installs said Skoog Patching Machine does not operate for more than ten regular working days during any calendar month during the last twelve months of said two

year period, then the said lessor agrees to waive the rental charges of two Hundred Fifty Dollars, ($250.00) for such month.

2. In the event that the rental charge of $250.00 per month is waived by the lessor, as in the preceding paragraph provided, then the original two year period fixed in said lease of May 5, 1943 during which the lessee agrees to pay the lessor $250.00 per month, shall be extended by the number of months in which such waiver occurred.

3. In the event that the lessee desires to ask for a waiver of rental as set forth in paragraph one hereof, the lessee shall accompany such application for waiver with adequate proof that its plant has not operated for more than ten days during the calendar month involved in such application for waiver. It is specifically agreed that the lessor shall have the right to inspect the operation records of the lessee to determine whether the lessee is entitled to the waiver applied for.

4. It is specifically agreed between the parties hereto that in no event shall there be a waiver of the agreed monthly rental charge for more than three successive months.

5. This agreement for the waiver of the monthly rental charge fixed in said lease of May 5, 1943 shall after the first year of the period of the lease dated May 5, 1943 be in full force and effect during the original two year term of said lease as well as during extensions thereof.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

Olympia Plywood Machinery
Corporation,
s/ By Arnold Koutonen,
President,
Attest:
/s/ Lynn Norman,
Secretary,
Lessor,
Buffelen Lumber & Manufacturing Co.
/s/ By Frank S. Neal,
President,
Attest:
/s/ J. P. Simpson,
Secretary.
Lessee.

PLAINTIFFS' EXHIBIT G

LEASE

This Agreement of Lease is made and executed this 15th day of November, 1945, between Olympia Plywood Machinery Corporation, a corporation organized under the laws of the State of Washington, hereinafter called the lessor, and Hamilton Veneer Co., a corporation organized under the laws of the State of South Carolina, hereinafter called the lessee, Witnesseth:

That the lessor under the terms and conditions herein set forth hereby leases and lets to the lessee

that certain machine with accessories known as "Skoog Patching Machine."

This machine is to be used by the lessee in the operation of its plywood plant at Orangeburg in the State of South Carolina.

This lease is for a period of two years.

As rental for said machine for said two year period the lessee agrees to pay the said lessor the sum of Six Thousand Dollars ($6,000.00), which rental shall be paid in twenty-four equal monthly installments beginning with the month of December, 1945.

Said lessor agrees as soon as possible to deliver said machine to the lessee f.o.b. the lessor's plant in Olympia, Washington. The transportation of said machine from lessor's plant at Olympia, Washington to the plant of the lessee where same is to be used shall be at the sole risk and expense of the lessee.

Said lessee shall install said machine solely at its own expense; provided, however, that such installation shall be under the supervision of the lessor's agents, the expense of the lessor's agents to be paid by the lessee.

In the event that said machine is delivered at the plant of the lessor at any time between the first and fifteenth of any month, then said two year term shall commence on the first day of the month during which such delivery is made. In the event said machine is delivered to the lessor's plant at any time after the fifteenth of the month, then the said two year term of this lease shall commence on the

first day of the month following that in which said machine has been delivered. In the event said machine is delivered between the first and fifteenth of the month, the rent for the first month in the sum of Two Hundred Fifty Dollars ($250.00) shall be paid on or before the 20th of that month, otherwise, the lessee shall pay to the lessor the first monthly payment of said rent in the sum of Two Hundred Fifty Dollars ($250.00) on the first day of the following month. Thereafter on the first day of each succeeding month a like sum of Two Hundred Fifty Dollars ($250.00) shall be paid the lessor by the lessee during said entire two year term. The said two year term above provided for shall be extended for the term of one year unless the lessee thirty days before the expiration of said two year term shall notify the lessor in writing that it desires to terminate said lease at the end of said two year term. In the event said lease is extended for said additional year, the lessee agrees to pay the lessor for said one year extension the sum of Fifteen Hundred Dollars ($1500.00), which rental shall be paid in twelve (12) equal monthly installments of One Hundred Twenty-five Dollars ($125.00) each. In the absence of like written notice to the lessor by the lessee before the expiration of said additional term of one year, said lease shall be extended from year to year at the same rate, namely Fifteen Hundred Dollars ($1500.00) per year, payable in twelve equal monthly installments of One Hundred Twenty-five Dollars ($125.00) each.

The lessor warrants that it is the owner of said

property and has the right to make this lease. It is understood by the parties that the lessor has two United States patents on said machine bearing numbers 2336703 and 2336704 and one patent issued by the Dominion of Canada bearing number 421291, and that in addition thereto the lessor has certain other patents pending. The lessee agrees to refrain from in any manner infringing upon lessor's rights to manufacture and sell such machine and agrees not to manufacture, own or operate any machine other than those which it may lease from the lessor which machines have the same purpose and do the same work as that herein described.

The lessee agrees to keep said machine safely, to operate the same with reasonable care, and maintain the same in good repair. The lessee shall not have the right to assign this lease or any interest therein, nor to pledge the same, nor to loan the machine herein described or any part thereof to any other person or corporation, nor to change the location thereof as herein provided, without first receiving the written consent of the lessor to such assignment, pledging, leasing, or loaning.

The lessee likewise agrees to keep said machine free from liens of every kind and character.

It is specifically agreed between the parties that this is a rental contract only, that it is not a sale or conditional sale, and that the title to the said machine and the accessories and all additions thereto shall remain in the lessor, free from all claims of the lessee or other persons excepting as disclosed herein.

The lessee agrees during the term of this lease and all extensions thereof to pay all taxes and assessments that may be levied against said leased machine and accessories and further agrees at lessee's expense to keep the same insured to the extent of not less than $6,000.00 against loss by fire or other cause, with loss first payable to the lessor as its interest shall appear and thereafter to the lessee. During the life of this lease such insurance policies, together with receipts showing payment of premiums thereon, shall be delivered to and kept in the possession of the lessor. In the event that said machine is destroyed by fire, then the lessor on receipt of the insurance shall replace the destroyed machine by a new machine. The monthly payments shall be suspended from the time of the fire until the new machine is delivered to the lessee, and the two year term of this lease shall be extended by the number of months during which such suspension is in effect.

It is agreed that in the event the "Skoog Patching Machine", after installation, is not operated by lessee for more than ten working days during any calendar month during the last twelve months of said two year term, then the lessor agrees to waive the rental charges of $250.00 for such month.

It is also agreed that should the said lessee after the installation of said "Skoog Patching Machine" be unable to use the same for ten days or more by reason of fire, strikes or other causes beyond the control of the lessee, then the said lessor agrees to waive the rental charges of $250.00 per month for such period of suspension.

In the event that any rental charges are waived or deferred by the lessor as in either of the two preceding paragraphs provided, then the original two year period during which the lessee agrees to pay $250.00 per month shall be extended by the number of months for which such waiver or deferment was had.

In the event that the lessee desires to ask for a waiver or deferment of rental as provided for herein, the lessee shall accompany such application for waiver or deferment with adequate proof of the facts upon which its application for waiver or deferment is based, giving the exact period during which said machine was not used and the reasons for such non-use. It is specifically agreed that the lessor shall have the right to inspect the operation records of the lessee to determine whether the lessee is entitled to the waiver of deferment applied for.

It is specifically agreed between the parties hereto that in no event shall there be a waiver of the agreed monthly rental charge for more than three successive months.

The stipulations herein contained providing for the waiver or deferment of the monthly rental charge fixed in this lease shall be in full force and effect during the original two year term of said lease as well as during all extensions thereof.

The lessee hereby accepts said machine and agrees to hold the lessor harmless from all liability or claims for damage to the said lessee, its agents, officers or employees, or to any other person or cor-

poration, whether said liability or claim for injuries or damage results from breakage, fire or other casualty or results from the operation of said machine.

The lessor agrees to defend at its own expense any patent infringement suit which may be started by any third party against the lessee by reason of the use of said "Skoog Patching Machine" by the lessee by virtue of this agreement.

In the event the lessee fails to pay any installment of rent at the times and in the manner herein provided and becomes in default thereon for thirty days, the lessor may at its option without notice terminate this lease, enter upon the lessee's premises and repossess itself of said machine and accessories. The said lessor shall likewise have the right at its option to cancel this lease on acount of the lessee's failure to keep and perform any other provision hereof; provided, however, that the lessor shall give the lessee written notice of its failure to perform this lease and shall exercise its right to cancel the same only in the event that the lessee fails for thirty days after the receipt of such notice to completely fulfill its obligations under this lease.

On the expiration of said two year term or any extension of this lease, the lessee agrees to dismantle said machine and deliver the same to the lessor in as good condition as the same is now in, reasonable wear excepted.

Time is of the essence of this lease.

This contract of lease is binding upon the parties hereto, their successors and assigns.

This lease is executed in duplicate on the day and year first above written.

Olympia Plywood Machinery Corporation,

/s/ By Alfred Revell,
Agent
Lessor.

Hamilton Veneer Co.
Vice President

/s/ By (Illegible)

Attest /s/ Simms Ottinger,
Secretary,
Lessee.

PLAINTIFFS' EXHIBIT H

[Note: Exhibit H is a blank form of lease same as Exhibit G at pages 47-54 except for last line of first paragraph on page 50 which reads as follows: "same work as that herein described under methods covered by the above patents."]

PLAINTIFFS' EXHIBIT I

LEASE

This Agreement of Lease is made and executed this ..... day of ....., 195....., between the Associated Plywood Mills, Inc. a corporation organized under the laws of the State

of Washington, hereinafter called the lessor, and ....., a corporation organized under the laws of the State of....., hereinafter called the lessee, Witnesseth:

That the lessor under the terms and conditions herein set forth hereby leases and lets to the lessee that certain machine with accessories known as "Skoog Patching Machine", Carrying Manufacturer's Number .....

This machine is to be used by the lessee in the operation of its Plywood plant located at..... ..... in the State of .....

As rental for said machine, the lessee agrees to pay the said lessor a monthly rental of $250.00, payable on the first of each month, beginning with the month of ..... 195.....

After the lessee has paid to the lessor thirty such monthly payments of $250.00, a monthly rental of $125.00 shall be applied and paid by the lessee as long as this machine is held by the lessee.

Lessor shall deliver said machine to Lessee f.o.b. Lessor's plant in Olympia, Washington, and which same shall be transported by Lessee at its risk and expense to its said plant and there installed. Said Lessee shall install said machine solely at his own expense providing, however, that such installation shall be under the supervision of the Lessor's agents, the expense of the Lessor's agents to be paid by the Lessee.

The Lessee shall notify the Lessor when the ma-

chine is ready for installation and Lessor agrees to furnish such supervision as above stated.

The Lessee agrees not to operate, alter, or otherwise tamper with the machine before the Lessor's supervisor has inspected and adjusted the machine and is satisfied that the machine is properly installed and instructions rendered as to its proper maintenance. The payments of the contract shall begin on the date the machine has passed inspection by the Lessor's supervisor.

In the event said machine is put in service at any time after the first of the month and before the first of the succeeding month, the Lessee agrees to pay the rental for said fraction of the month on a prorata basis, said rental to be based on $250.00 monthly rental.

The Lessor warrants that he is the owner of said property and has the right to make this lease. It is understood by the parties that the Lessor has two United States patents on said machine bearing numbers 2336703 and 2336704 and one patent issued by the Dominion of Canada bearing number 421291. The Lessee agrees to refrain from in any manner infringing upon Lessor's rights to manufacture and sell such machine and own or operate any machine which would infringe on the Lessor's patent rights.

The Lessee agrees to keep said machine safely, to operate the same with reasonable care, and maintain the same in good repair. The Lessee shall not have the right to assign this lease or any interest therein, nor to pledge the same, nor to loan the

machine herein described or any part thereof to any other person or corporation, nor to change the location thereof as herein provided, without first receiving the written consent of the Lessor to such assignment, pledging, leasing, or loaning.

The Lessee likewise agrees to keep said machine free from liens of every kind and character.

It is specifically agreed between the parties that this is a rental contract only, that it is not a sale or conditional sale, and that the title to said machine and the accessories and all additions thereto shall remain in the Lessor, free from all claims of the Lessee or other person excepting as disclosed herein.

The Lessee agrees during the term of this lease and all extensions thereof to pay all taxes and assessments that may be levied against said leased machine and accessories and further agrees at Lessee's expense to keep the same insured to the extent of not less than $4,000.00 against loss by fire or other cause. In the event that said machine is destroyed by fire or other cause, then the Lessor on receipt of the insurance shall replace the destroyed machine by another machine. The monthly payments shall be suspended from the time of the loss until a replacement machine is delivered to the Lessee.

The Lessee hereby accepts said machine and agrees to hold the Lessor harmless from all liability or claims for damage to the said Lessee, its agents, officers, or employees, or to any other person or corporation, whether said liability or claim for injur-

ies or damage results from breakage, fire or other casualty, or results from the operation of said machine.

The Lessor agrees to defend at its own expense any patent infringement suit which may be started by any third party against the lessee by reason of the use of said "Skoog Patching Machine" by the Lessee by virtue of this agreement.

In the event the Lessee desires to discontinue the use of this machine, the Lessee agrees to notify the Lessor in writing. Such notice to be given thirty days in advance and be accompanied by payment in full to the date this contract shall expire.

Upon termination of this contract, the Lessee agrees to dismantle said machine, properly skid and crate the same and deliver the same, freight prepaid, to the Lessor, at its plant in Olympia, Washington, in as good condition as the same is now in, reasonable wear excepted.

Time is of the essence of this lease.

This lease is executed in duplicate on the day and year first above written.

Associated Plywood Mills, Inc.

.....

Lessor

By .....

Lessee

By .....

President

PLAINTIFFS' EXHIBIT J

(Copy)

Smith & Tuck

Attorneys and Counselors in
Patent and Trade Mark Causes

734 Central Building, Seattle 4, Washington, MAin 3740.

Herber E. Smith (1949)
Clarence M. Tuck
Ford E. Smith

Duane C. Bowen

July 25, 1952

Hardel Plywood Company,
P. O. Box 365,
Olympia, Washington.

Attention: Mr. Frank Morris, Vice Pres. Gen. Mgr.

Gentlemen:

On behalf of our client, Associated Plywood Company of Eugene, Oregon, we wish to inform you that it owns the right, title and interest in and to United States Letters Patent Nos. 2,336,703 and 2,336,704, with the right to bring restrain infringement against those using without the right the machinery and processes claimed in said patents.

It has come to our attention as well as to our client that you are using machinery and processes for patching veneer which infringes said patents. Our client demands that you immediately cease and

desist your infringement of said patents. Furthermore, our client demands an accounting of your profits in this infringement and payment for the damages it has suffered because of your unlicensed use of said infringing machinery and processes. We will expect to hear from you in this respect within ten days of the date hereof. Otherwise please be assured that we are authorized to seek legal redress for all continued infringements and will do so promptly.

We are enclosing a copy of said patents for your reference.

Most sincerely yours,

Smith & Tuck,
/s/ Ford E. Smith
Ford E. Smith.

FES:ams

PLAINTIFFS' EXHIBIT K

(Copy)

In the District Court of the United States
for the District of Oregon

Civil Action No. 6579

E. V. PRENTICE CO., Plaintiff,

vs.

ASSOCIATED PLYWOOD MILLS, INC.
Defendant.

VERDICT IN FAVOR OF PRENTICE

We, the jury, duly impaneled and sworn to try the above entitled cause, do find our verdict in favor of Prentice.

Dated this 24th day of November, 1952.
/s/ G. Glenn Holmes,
Foreman.

[Title of District Court and Cause No. 6579.]

INTERROGATORIES

We, the jury, duly impaneled and sworn to try the above entitled cause, make the following answers to the special interrogatories submitted to us in connection with the validity of the Skoog patents:

I.

1. Does the Raimann patent either alone or in combination with the Anderson or Painchaud

patents anticipate the Skoog patents? Yes x No.—

2. Does the combination of elements and steps in the Skoog patents produce an unusual and surprising result? Yes — No x

3. Was there public knowledge of the accused machine in the United States before the Skoog inventions? Yes x No —

4. Was the accused machine disclosed in publications before the Skoog inventions? Yes x No —

5. Was the accused machine "on sale" in the United States before the Skoog invention? Yes x No —

II.

We, the jury, make the following answers to the special interrogatories submitted to us in connection with the infringement of the Skoog patents by the Raimann A.S.A. machine:

1. Are each of the material and positively claimed elements and steps, or the equivalents, called for in one or more claims of the Skoog patents present in the accused machine? Yes — No—

Dated this 24th day of November, 1952.

/s/ G. Glenn Holmes,
Foreman.

PLAINTIFFS' EXHIBIT L

[Title of District Court and Cause No. 6579.]

(Copy)

OPINION

April 17, 1953

This matter is now before the court on plaintiff's application for an allowance of attorney fees pursuant to 35 USCA 70, which provides that "the Court may in its discretion award reasonable attorney fees to the prevailing party upon an entry of judgment on any patent case."

In the case of Park-In-Theatres v. Perkins (9 Cir. 1951) 190 F.2d 137, the court, in construing such section, stated at page 142:

> "The exercise of discretion in favor of such an allowance should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force, which makes it grossly unjust that the winner of the particular law suit be left to bear the burden of his own counsel fees which prevailing litigants normally bear."

Both parties agree that such construction of the statute is proper and binding upon this court and that the section is the new patent code, 35 USCA 285, which provides: "The Court in exceptional cases may award reasonable attorney fees to the

prevailing party," neither enlarges nor diminishes plaintiff's rights.

The pleadings and the evidence adduced not only at the trial but also at the hearing on the motion for attorney fees show that, in 1936, B. Raimann GMBH of Frieberg, Germany, a manufacturer of wood working machinery, obtained a German patent on an automatic veneer patching machine. In 1941, Per F. Skoog applied to the United States Patent Office for two patents one a means patent and the other a methods patent, for the patching of veneer sheets. On December 14, 1943, both of such patents were issued to Skoog's assignee, the Olympia Plywood Machinery Corporation, the predecessor of defendant, Associated Plywood Mills, Inc.

For the sake of convenience, the plaintiff, E. V. Prentice Company, will be hereafter referred to as "Prentice;" the defendant, Associated Plywood Mills, Inc., as "Associated;" B. Raimann GMBH as "Raimann;" the German patent obtained by Raimann as the "Raimann patent;" the automatic veneer patching machine produced by Raimann as the "Raimann machine" or the "accused machine;" and the method and means patents issued to Associated on December 14, 1943, as the "Skoog patents."

Prentice is in the industrial equipment business and sells, among other items, the Raimann machines which are imported from Germany. Associated's primary business is that of manufacturing plywood at its plant in Eugene, Oregon. It also has

manufactured for it the Skoog veneer patching machines which it makes available to the plywood industry by lease agreements.

In June 1950, a Raimann machine was exhibited at the Forest Products Show in Portland, Oregon. Prentice, while negotiating for a distributorship of the Raimann line for the Pacific Coast states, invited a number of its customers, including Associated, to see and examine the Raimann machine. Pursuant to such invitation, John Gragg, Associated's superintendent, saw the Raimann machine in operation. Shortly thereafter, Prentice obtained the exclusive distributorship of the Raimann machine for the Pacific Coast. Between July 1950 and August 1952, Prentice sold and delivered 59 Raimann machines to plywood manufacturing concerns in its territory. Some of these machines were used to replace the leased Skoog machines. During the year 1951, Associated became aware that Raimann machines were being sold to plywood manufacturers in this area.

During the early part of 1952, at the request of Skoog, the patent lawyer for Skoog (who was also the patent lawyer for Associated) visited a plywood plant and saw a Raimann machine in operation. They then communicated with Associated with reference to possible infringement actions and, on March 11, 1952, they met with Associated's Board of Directors. At that meeting, Associated gave them the advertising material which it had received on the previous day from Prentice. It consisted of a picture and description of the Rai-

mann machine and a list of 31 users of the machine on the Pacific Coast. On April 30, 1952, Associated's Board authorized its patent lawyer to commence legal proceedings, first to prevent the use of the infringing machines and, second, to obtain damages.

Associated's patent lawyer made an investigation to determine whether the Raimann machine infringed any of the claims of the Skoog patents. But he did not contact either Prentice or Raimann and neither company knew that an investigation was being made.

On July 25, Associated's lawyer sent letters, by registered mail, to 29 of Prentice's 31 United States customers, who were listed in the advertising material mailed to Associated as having purchased Raimann machines. The letter stated in part:

> "It has come to our attention as well as to our client that you are using machinery and processes for patching veneer which infringes said patents. Our client demands that you immediately cease and desist your infringement of said patents. Furthermore, our client demands an accounting of your profits in this infringement and payment for the damages it has suffered because of your unlicensed use of said infringing machinery and processes. We will expect to hear from you in this respect within ten days of the date hereof. Otherwise, please be assured that we are authorized to seek legal redress for all continued infringements and will do so promptly."

No such letter was sent either to Prentice or to Raimann and neither company, prior to that time, knew that Associated claimed that the Raimann machine infringed the Skoog patents. The receipt of such letters caused great consternation among Prentice's customers and effectively stopped sales of Raimann machines, as well as other equipment sold or distributed by Prentice.

On August 8, 1952, Prentice filed an action in this court against Associated in which it prayed not only for a declaration of invalidity of all claims of the Skoog patents but also for a finding of no infringement. It also requested a permanent injunction restraining Associated from suing or threatening to sue any customer or user of the Raimann machine for patent infringement or from asserting or charging that said Raimann machines infringed the Skoog patents. Prentice also demanded costs and reasonable attorney fees.

On August 15, 1952, additional letters were mailed by Associated to all firms who had not answered its letter of July 25, requesting information as to whether or not they had ceased the alleged infringing use of the Raimann machine.

On August 18, in the U. S. District Court for the Western District of Washington, Northern Division, Associated filed an action for damages against the Buffelen Manufacturing Company, a customer of Prentice who had purchased two Raimann machines, alleging that those machines infringed the Skoog patents. When it filed this case,

PLAINTIFFS' EXHIBIT B (P.1b)

Dec. 14, 1943. P. F. SKOOG 2,336,704

MEANS FOR PATCHING VENEER SHEETS

Filed April 21, 1941 3 Sheets-Sheet 1

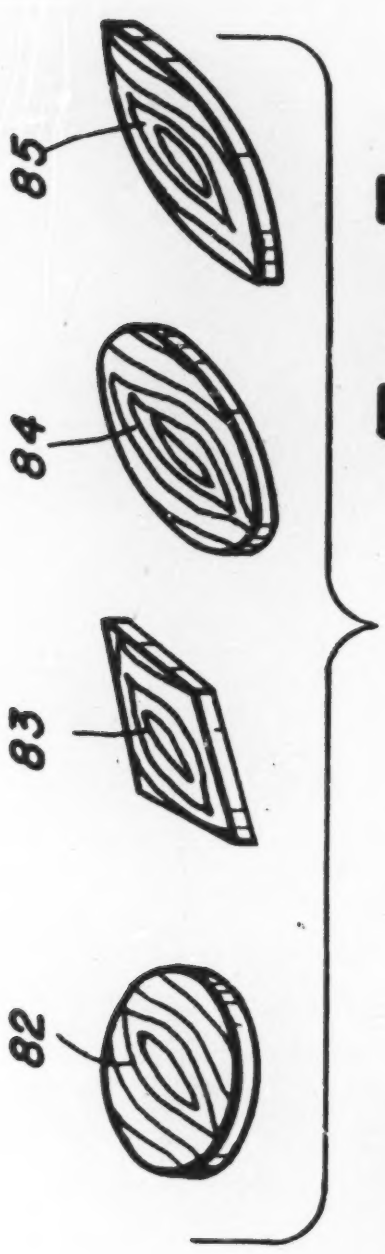


FIG_3

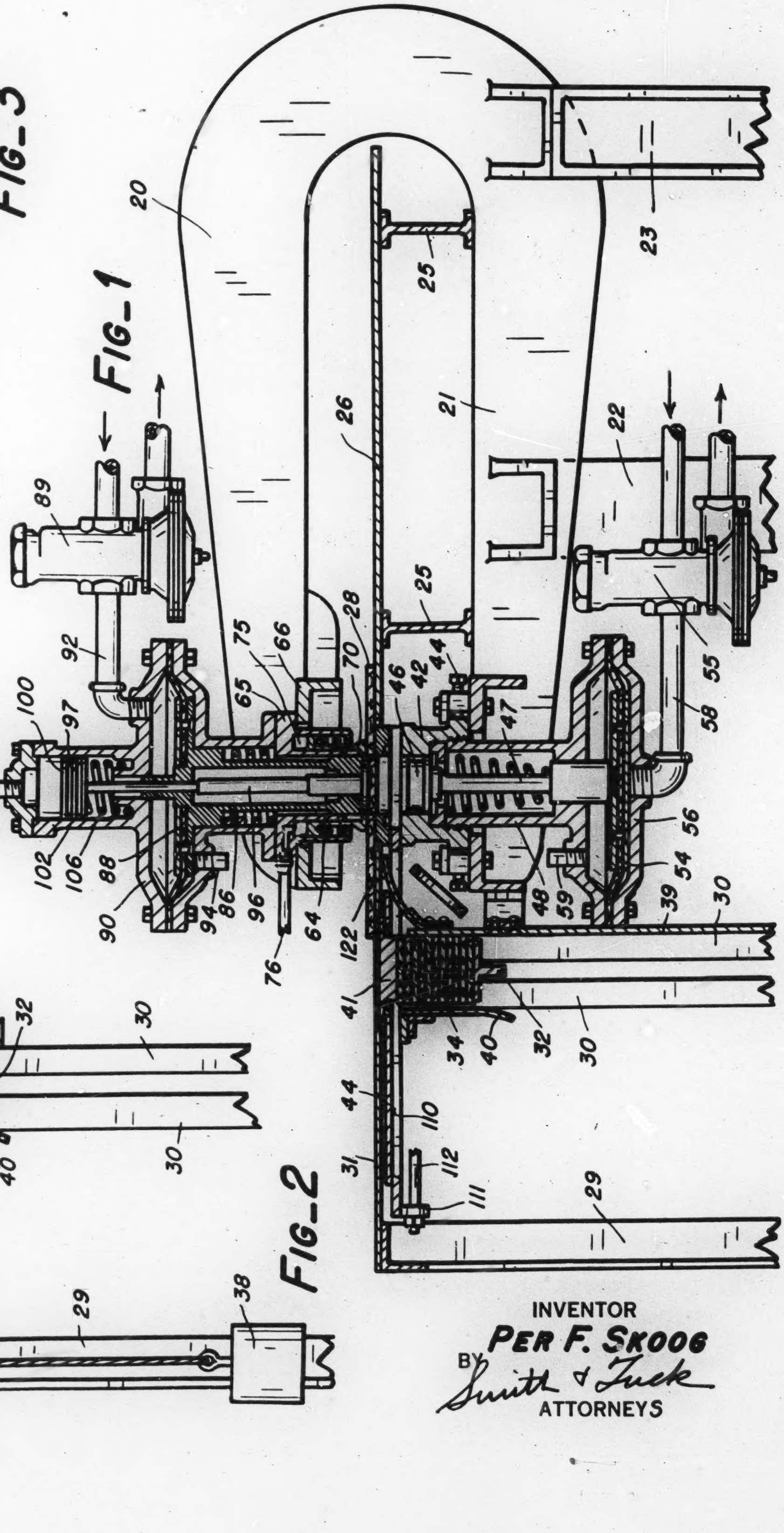


FIG_1

FIG_2

INVENTOR
PER F. SKOOG
BY Smith & Tuck
ATTORNEYS

(8.17)

Dec. 14, 1943. P. F. SKOOG 2,336,704

MEANS FOR PATCHING VENEER SHEETS

Filed April 21, 1941 3 Sheets-Sheet 2

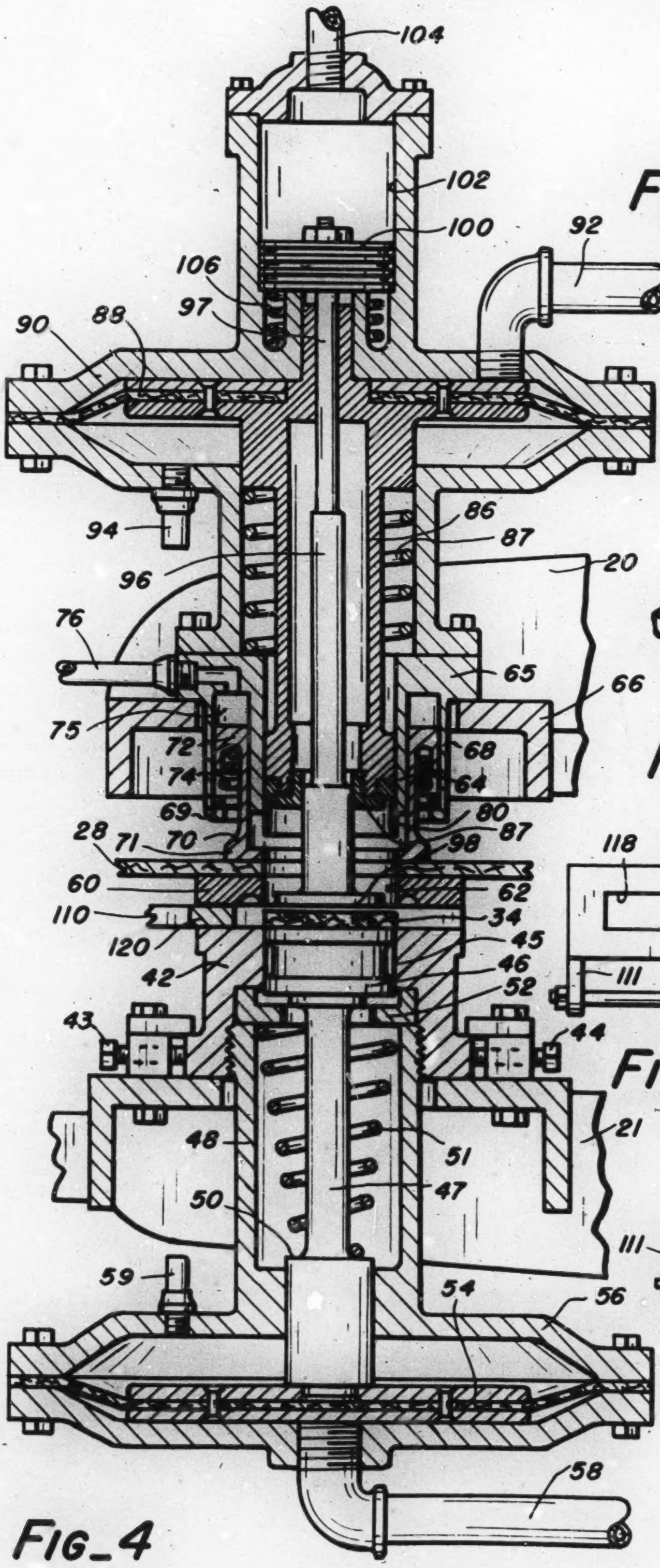


FIG_4

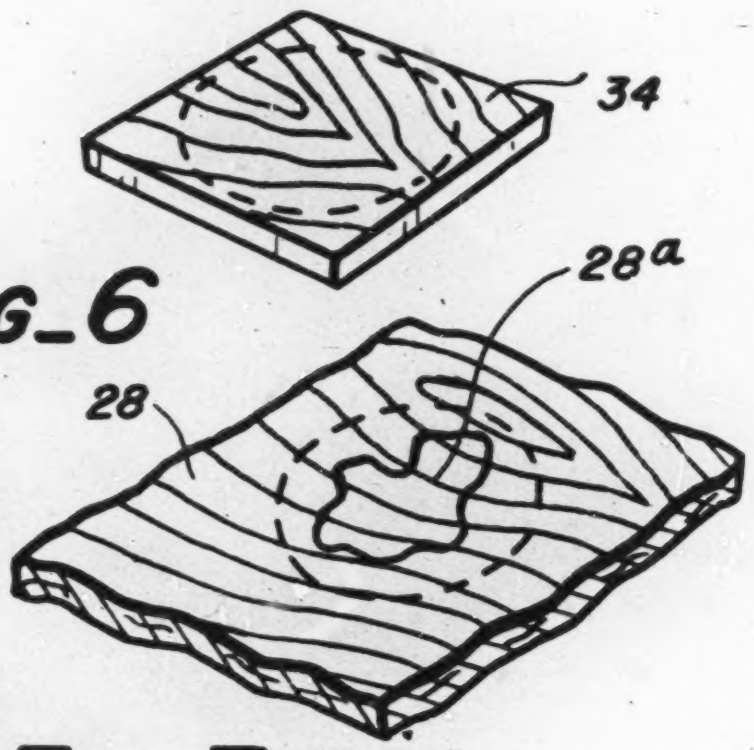


FIG_6

FIG_7

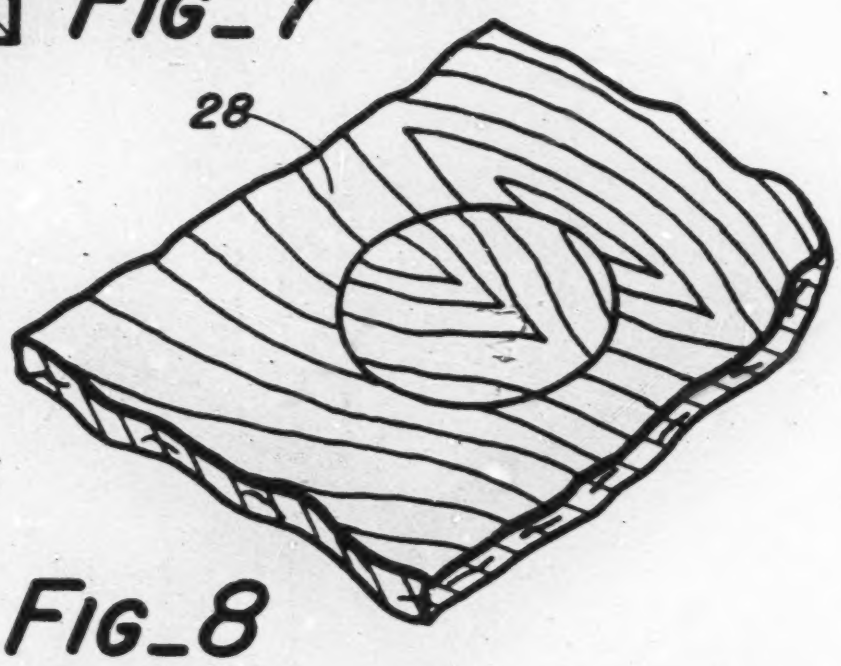


FIG_8

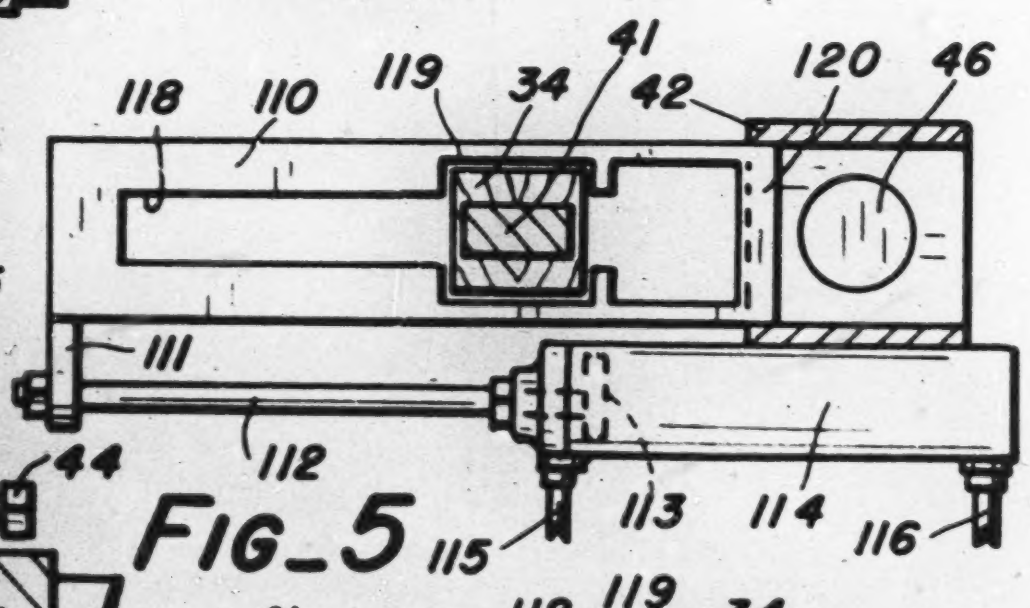


FIG_5

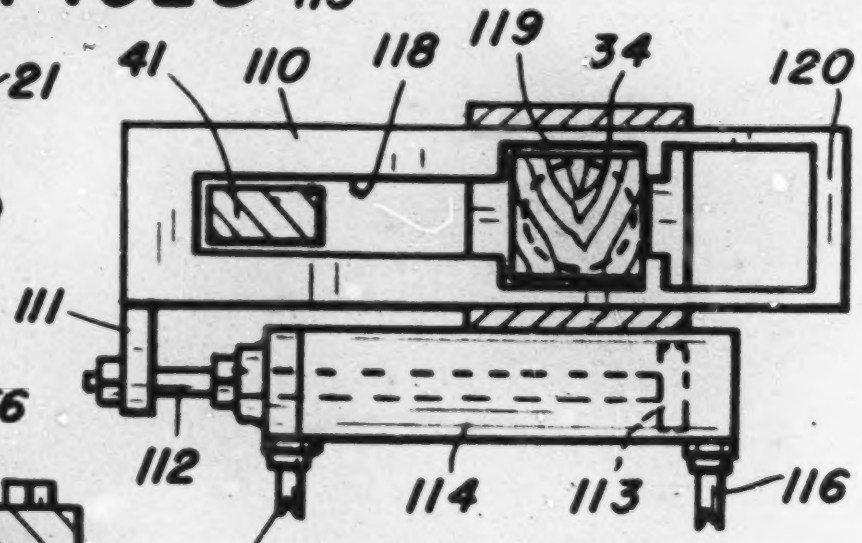


FIG_5a

INVENTOR
PER F. SKOOG
BY Smith & Tuck
ATTORNEYS

(p. 18)

Dec. 14, 1943. P. F. SKOOG 2,336,704

MEANS FOR PATCHING VENEER SHEETS

Filed April 21, 1941 3 Sheets-Sheet 3

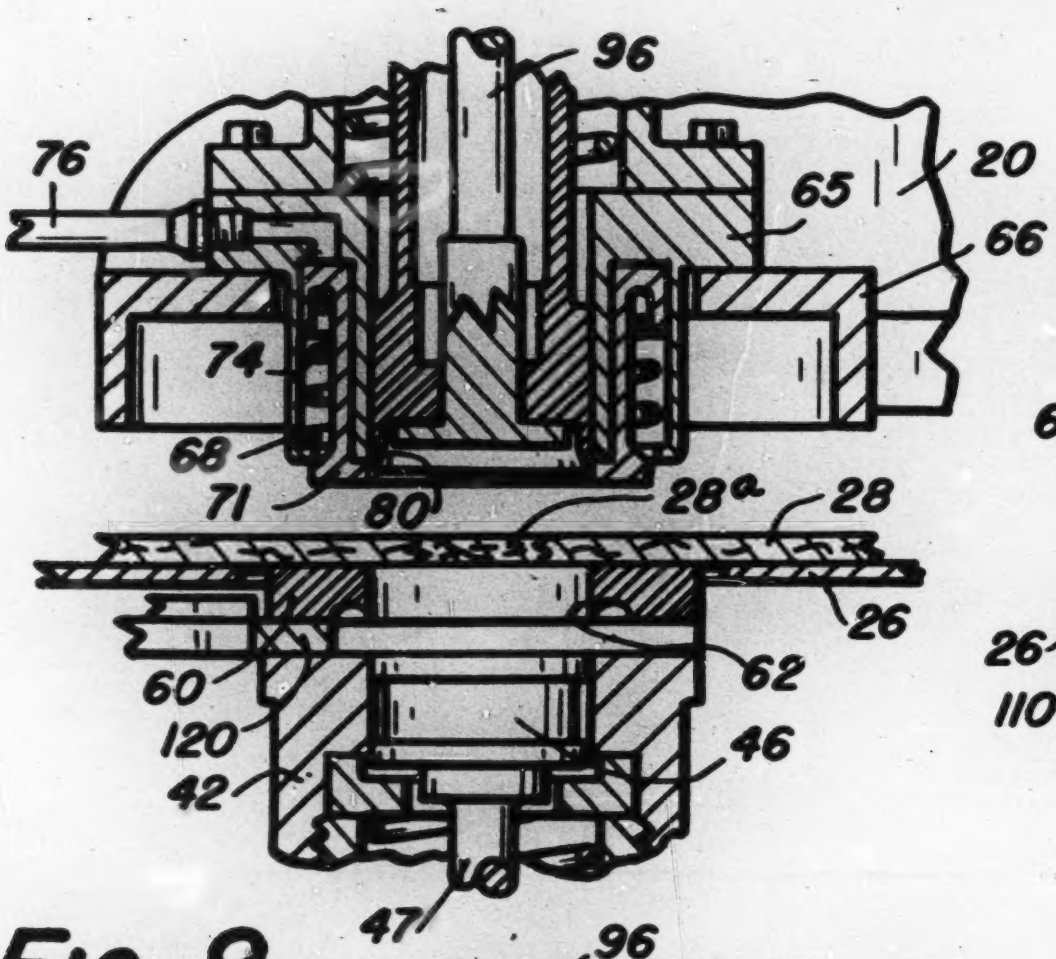
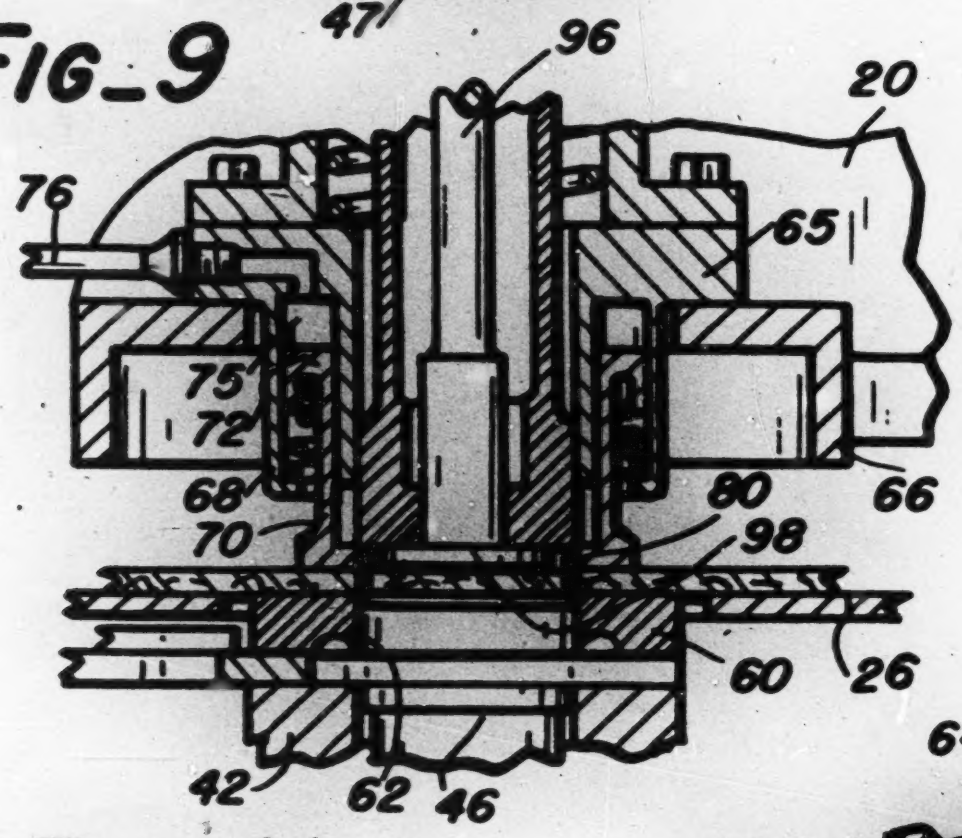


FIG_9



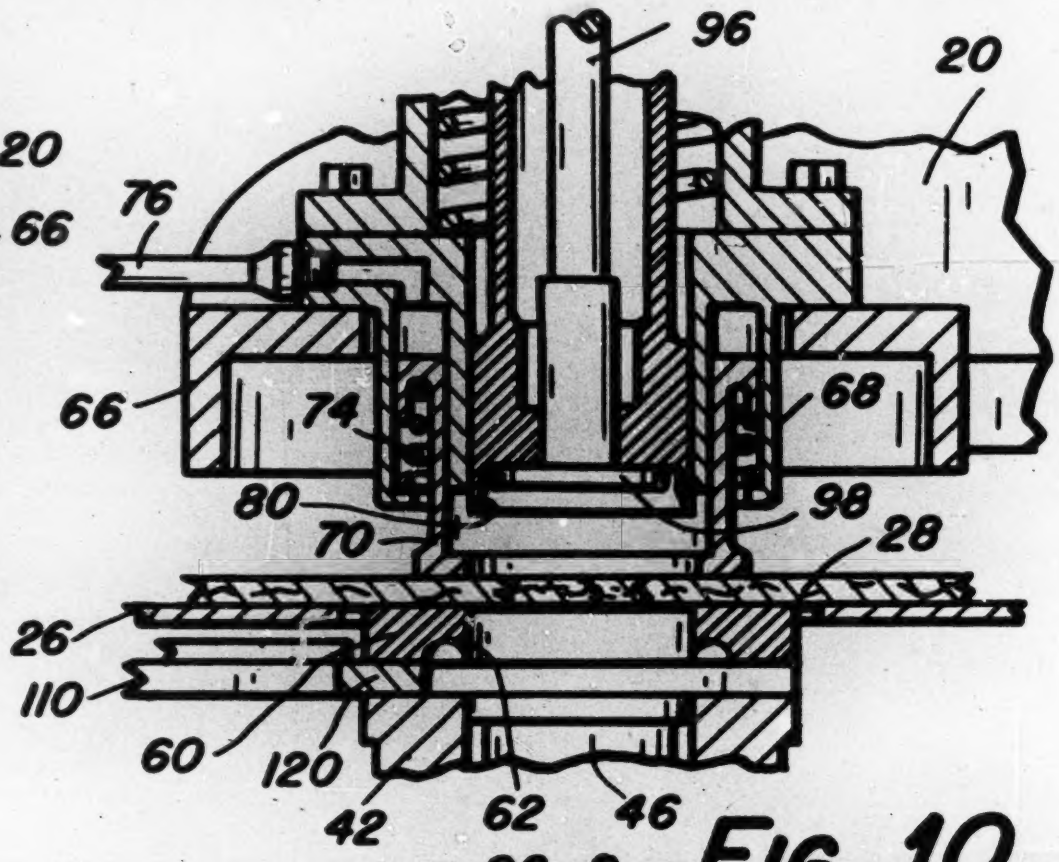


FIG_10

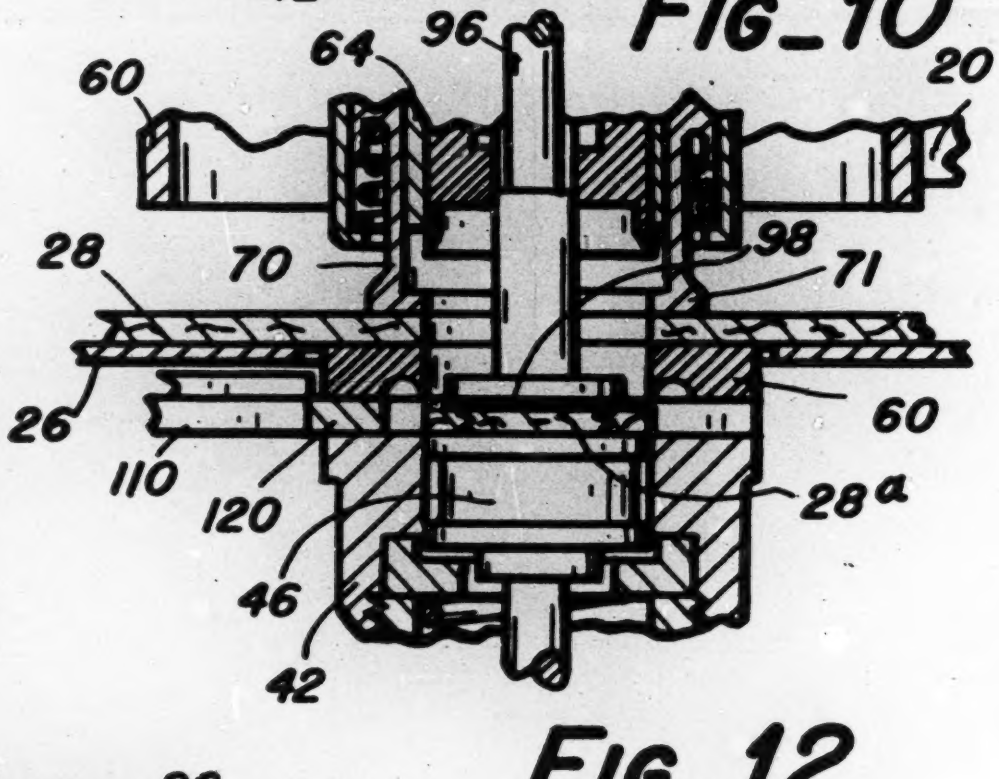


FIG_11

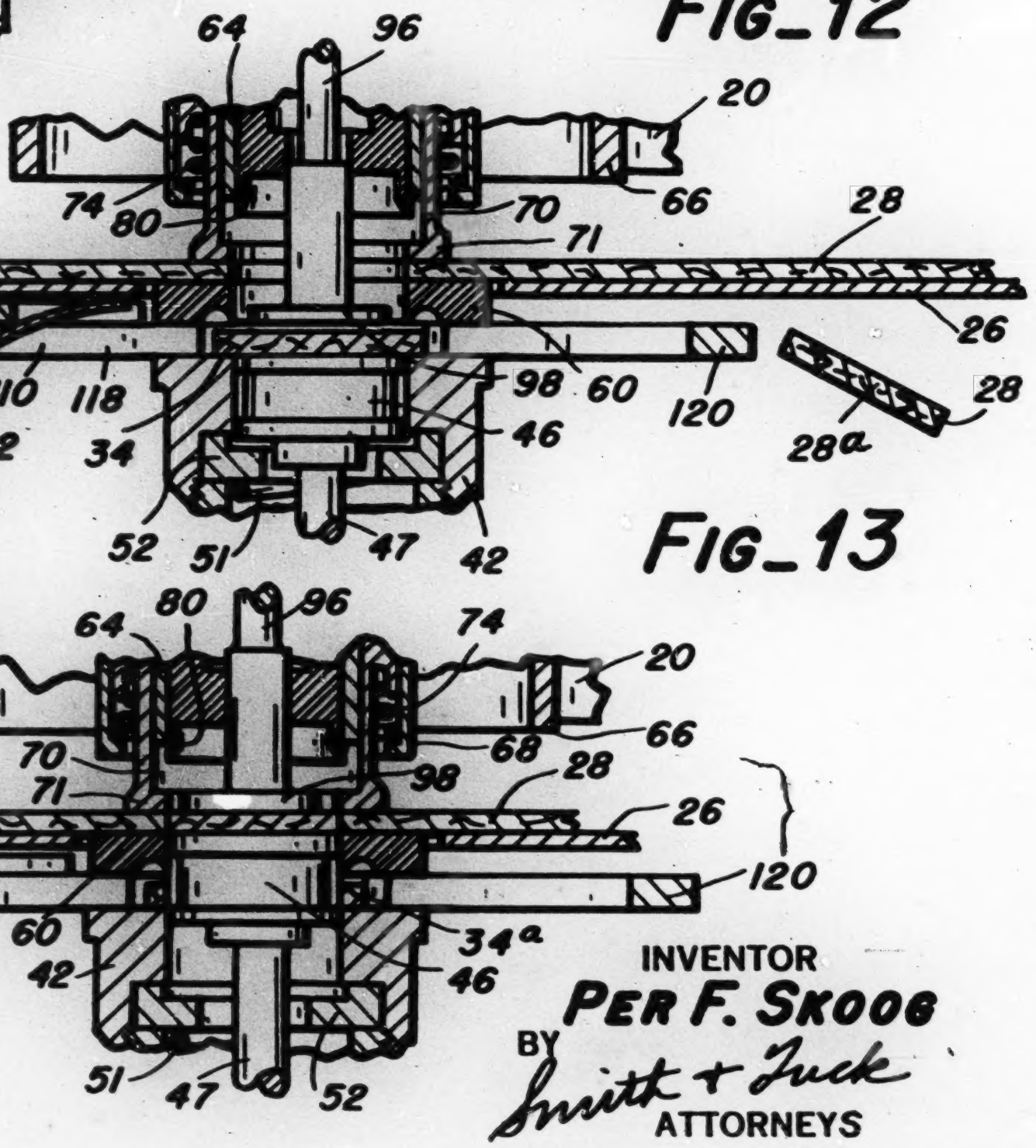


FIG_12

FIG_13

FIG_14

INVENTOR
PER F. SKOOG
BY Smith + Zuck
ATTORNEYS

Patented Dec. 14, 1943

(F-19)

2,336,704

UNITED STATES PATENT OFFICE

2,336,704

MEANS FOR PATCHING VENEER SHEETS

Per F. Skoog, Bellingham, Wash., assignor to Olympia Plywood Machinery Corporation, Olympia, Wash.

Application April 21, 1941, Serial No. 389,533

8 Claims. (Cl. 144—2)

This invention relates to an improved method and means for patching veneer sheets and is particularly adapted for use in the patching of thin wood veneer such as is produced in the lumber industry. In the practice of peeling logs, as compared to the older method of slicing the wood, to form veneer sheets it is common to have certain pieces that are defective by reason of the fact that they have disfiguring knots or other marred areas.

Ordinarily the patching and salvaging of such stock is a manual operation that requires a great amount of labor and is never satisfactorily done by hand. A suitable mechanically operable salvage means and method to effect such patching is desirable as such stock is usually of such low grade that it is unuseful in the manufacture of plywood of the standard or better grades. In manually patching veneer stock it is customary for a workman to cut by hand with a sharp knife, a boatshaped patch, or to cut a round patch by the use of a rotary saw. Subsequently, usually at another location a patch is cut from a piece of similar patching stock. This patch is placed in position where it is glued in the cutout area from which the marred veneer has been removed. This forming of patching is usually a three-step operation, the first being the cutting operation, the second being the formation of a patch suitable to fit in the cut-out portion, and the third the placement of the patch and its gluing into the stock being patched.

Ordinarily such patching operations are formed in a series of steps along a table set aside for that purpose. A considerable amount of time is consumed in effecting such patching. Patching is not, therefore, very satisfactory by this method because ordinarily it does not raise the grade sufficiently to extend any material advantage to the industry to offset the cost. As a result much good material can only command a relatively low sale price.

An important object of my invention is the provision of method and means for patching veneer sheets wherein the operation may be carried on at a single position and with great rapidity and efficiency.

Another object of my invention has been the provision of means for making a patch in veneer stock wherein the preparation of the material to be patched, the cutting of the patch, and the placement of the patch, is performed in a series of sequential steps all encompassed within a brief moment required for the operation.

A further object of my invention comprises the provision of a method of cutting a patching plug plank to the size and shape of a punch-cut area to be patched and inserting that cut plug into said area while always maintaining the plug compressed against edgewise expansion and warping so that when the plug is finally placed it will securely engage in the area that is patched.

Still another object of my invention relates to the provision of means for punch-cutting a marred area in sheet veneer which means will clamp such sheet about the marred area and hold it throughout the cutting and patching steps of my method.

Another and further objects of my invention relates to the provision of means for cutting and compressing a plug for placement in a veneer sheet while maintaining that cut plug against buckling or expansion as it passes through a cutting die, at one edge of which the plug is cut, until it is inserted into the area being patched.

A further object of my invention is the provision of plug-cutting and patching mechanism which is simple to manufacture and easy to assemble and capable of constant use with a minimum of maintenance and repair, and which mechanism may be operated under electrically controlled, timed valving mechanism or the equivalent.

Other objects and advantages of the invention will be apparent in the course of the following description wherein I have described a preferred form of my invention as shown in the accompanying drawings.

Figure 1 is a detailed assembly view of my plug-cutting and patching mechanism with portions shown in section and portions omitted for convenience of illustration.

Figure 2 illustrates the mechanism by which plug blanks are constantly fed for introduction into the patching mechanism.

Figure 3 is a bracketed view showing various types of plug which may be cut for use in patching operations practiced according to my described invention,

Figure 4 is an enlarged vertical sectional view of the principal elements of the plug-cutting and patching mechanism together with the operating parts therefor,

Figures 5 and 5A show sequentially in plan the plug blank feeding mechanism as utilized in my mechanism,

Figure 6 is a perspective view of a plug blank,

Figure 7 is a perspective view of a portion of a veneer sheet indicating a marred area to be patched and indicating, in dashed lines, the por-

tion that will be cut therefrom and subsequently patched,

Figure 8 is a perspective view of a fragment of a veneer sheet after the patching operation has been completed,

Figures 9, 10, 11, 12, 13, and 14 are fragmentary sectional views illustrating the movements of the various parts and the various steps of my method and means for patching veneer sheets.

Referring to the drawings, throughout which like reference characters indicate like parts, numeral 20 designates a horseshoe-shaped frame member utilized for supporting the mechanism I have devised for cutting plug patches for veneer sheets. The lower arm 21 of the frame member 20 is supported upon suitable legs 22 and 23 that may be mounted upon a work floor, the showing of the actual footing being eliminated for convenience of illustration.

By means of suitable structural members 25 a web table 26 is disposed within the arms of the frame 20 in a horizontal position for the reception of a sheet of veneer stock 28 that may be laid thereon for patching. While I have shown the sheet 28 as being of relatively small size it will be understood that it is intended that this mechanism is for the patching of extremely large size veneer sheets of the nature that are now commonly being cut in veneer plants.

Positioned adjacent the mouth of the frame member 20 is a pair of supporting legs 29 and 30—30 which mount the table element 31 that is aligned horizontally with the table element 26. The legs 30—30 are spaced apart and a vertically movable lifter bar 32 is guided there-between. Bar 32 supports a plurality of plug patch blanks 34 as indicated in Figure 1. At its end member 32 has coupled thereto a cord or cable 35 that passes over sheaves 36 and 37 and has attached thereto a weight 38 that hangs at some remote point and constantly urges the member 32 upwardly. The blanks 34, resting on bar 32, are aligned on their forward edges against the plate 39 and on their rear edge they are kept in alignment by means of the shoe 40.

As the individual members of the group of plug blanks supported by the bar 32 are forced upwardly they come against the bottom face of stop block 41 that is positioned in a hole in plate 44 that is disposed just under the table 31.

Supported on the lower arm 21 of the frame member 20 is a base block 42 that is adapted to be shifted for very careful adjustment by a suitable screw mechanism for proper positioning in alignment with other parts of my device which is ordinarily mounted directly thereabove for cutting and patching veneer sheets. For example the block 42 may be shifted longitudinally by backing off adjustment screw 43 while advancing a similar adjustment screw 44.

Fitted into an opening 45 within the base-block 42 is a ram or plunger member 46 that has a shank 47 extending downwardly therefrom into a chamber in the cylinder 48 which depends from the base member 42. The shank 47 is shouldered at 50 and a coil spring 51 encircling the shank is seated between the flange ring 52 in the upper portion of the chamber and the shoulder 50 below to constantly urge the member 26 downward. At its lower end the shank 47 is associated with the diaphragm 54 in the diaphragm chamber or housing 56 to which air or other fluid pressure means may be supplied and exhausted by means of the tubes 58 and 59.

Above the base member 42 is a cutting die 60 which has an interior passage 62 that is normally aligned with the opening 45 on the base 42. The die 60 is so formed that it has a cutting or shearing edge at its upper end as well as one on its lower end of the opening 62.

On the upper arm of the frame 20 is mounted a cylinder 64 having an upper flange 65 that rests upon a suitable support member 66 associated with the arm. An auxiliary cylinder 68 depends also from flange 65 and encloses in spaced relation the cylinder 64. Positioned therebetween is the clamping shoe 70 having a foot 71 and an enlarged head 72 adapted to close the area between the cylindrical walls 64 and 68. An expansion coil spring 74 is positioned between a flange 69 on the cylindrical wall 68 and the under side of the head 72 of the clamp member 70 and constantly urges the member 70 upwardly.

Air supplied to the chamber 75 through the conduit 76 will permit the downward extrusion of the clamping member 70 into a clamping position upon a sheet of veneer stock indicated by the numeral 28.

Mounted for sliding movement in the inner face of the wall 64 is a knife member 80 which will hereinafter be described as circular although it will be apparent that the shape of the knife may conform to the shape of any of the patch plugs that are suggested in the bracketed view of Figure 3. For example the circular plug 82 could be cut by the member 80, whereas a diamond-shaped plug 83 an oval plug 84, or a boat-shaped plug 85 would be cut by tools shaped for that purpose.

The knife member 80 is engaged on the lower end of a tube 86 and is held in place by means of the nut 87. The upper end of the tube 86 is associated with the diaphragm 88 in the housing 90 to which air or other fluid under pressure may be supplied and from which it may be exhausted by means of the tubes 92 and 94.

A vertically movable shank 96 is slidably mounted in the nut member 87 and in an upper journal extension 97 of the tube 86. On its lower end the shank 96 has the pressure foot or shoe 98 that, in the case of the circular knife or cutter 80, is slightly smaller in diameter and adapted to be enclosed thereby on occasion.

On the upper end, shank 96 has the piston 100 mounted in the cylinder 102 to which air under pressure may be supplied through the conduit 104.

The piston 100 is normally urged upwardly as is also the shank 96 and the shoe 98 by means of a coil spring 106 positioned between the under side of the piston and the bottom of the piston chamber.

For introducing a plug-blank 34 to the under side of the die 60 or between member 42 and member 60 I employ the transversely slidable carrier bar 110 which has an offset arm 111 to which may be connected the rod 112 of the piston 113 within the chamber 114. The piston 113 may be moved either to the right or to the left, as seen in Figures 5 and 5A, by air or other fluid under pressure supplied to the tubes 115 and 116.

A slot 118 in the carrier bar is provided and has sufficient width to fit either side of the hold-down member 42 and to slide on either side of that member while at the same time advancing one of the plug-blanks 34 in the opening 119 in the arm into position for cutting. On its advanced or forward end the carrier or bar 110 carrying a clean-out bar or cross-head 120 which travels across the upper face of the member 42

and the member 46 and will wipe therefrom any debris from the veneer sheet cutting operation that may be deposited thereon. Spring 122 operates upwardly against the under side of the plug blank as it is being fed to the carrier bar to the cutting position and holds it against dislodgement during that travel.

To assist in cleaning out any debris that may remain in the carrier arm 110 after a blank has been cut into the proper shape for a patch, I employ the upwardly urged spring leaf 122 that may best be seen in Figures 1 and 13 and which rides in the slot 118 and the opening 119 and will deflect downwardly any such debris therein.

In the showings of the Figures 9 through 14, are illustrated, the various elements of the invention and the steps of the method by which the invention is practiced. In the Figure 9 I have shown fragments of the essential portions of the mechanism and this mechanism is shown in the "at rest" position. In this position the veneer sheet 28 is inserted between the member 60 and the clamping mechanism positioned thereabove so that the marred area 28a that is to be cut from the sheet 28 is within the effective cutting area of the knife 80.

In Figure 10 the first mechanical movement of the device is illustrated as having occurred. In that case the sheet 28 is clamped on the die 60 by means of the clamp mechanism 70 which is extruded downwardly from its upwardly supported position on the spring 74, through the urgence of air which has been introduced into chamber 75 against the upper face of the member 70 through the tube 76. When air is supplied to the tube 76 the member 70 seats firmly so that its foot 71 presses against the upper face of the sheet 28 and holds it tightly in place.

The next step in the method is illustrated in Figure 11 in which instance the knife 80 and the hold down member 98 have been forced downwardly under the urgence of air applied to the upper surface of the diaphragm 88 and also into the chamber 102 against the piston 100.

The thin knife edge of the member 80 shears out the marred portion 28a of the sheet 28 that is to be cut away and carries it downwardly. The debris is removed from within the knife by means of the foot 98 stripping it therefrom as the member 80 is withdrawn. This latter operation can be clearly seen in Figure 12 in which instance it will be noted that the clamp member 70 is still firmly holding the sheet 28 against the die 60. The debris or marred area 28a that has has been cut away is now lying on the upper surface of the upwardly movable ram member 46, from which it is to be removed by the operation of the laterally movable cross-head 120 on the carrier arm 110. Arm 110 moves across the upper face of member 46, between members 42 and 60, so that, as will be seen in Figure 13, the debris 28a is kicked out of the mechanism and falls in a suitable manner for disposal

At the same time, through the movement of the carrier arm across the member 40, a patching plug blank 34 is carried into position on to the upper face of the member 42 under the hold-down shoe 98. When a patch 34 is properly positioned under the die 60 the upwardly moving plunger 46 rises under the urgence of air supplied to the under side of the diaphragm 54 and the plug blank 34 is securely clamped between the ram and member 98 as it passes against the lower cutting edge of the die member 60 and through the opening or passage 62 therein. The cutting operation will bend certain of the wood fibers along the cut edge that will expand when freed from the die block to grip the inner edges of the opening in the veneer sheet. The cut plug patch is held under compression from top and bottom between the members 98 and the lower ram member 46 all of the time that it passes through the opening 62 in the cutting die 60. The plug and its bent fibers along the edge are held against edgewise expansion by the walls of the opening or passage 62 of the member 60 so that the patch plug has no opportunity to expand larger than its cut size. This compression is maintained all of the time until the plug shown in Figure 14 is brought into position in the member 28 whereupon the plug body and edge fibers are free to expand in the opening therein.

By means of suitable timing mechanism, these various steps hereinabove described are carried on sequentially with split-second timing where necessary. The details of such control mechanism is not shown as many types would perform suitably such simple functions.

The moment that the plug is placed in the opening as shown in Figure 14, the shoe 98 rises and the ram 46 is forced downwardly by the action of the spring 51 or by means of air that may be supplied to the upper side of the diaphragm 54. The cutting and patching mechanism returns to the "at rest" position as shown in Figure 9. Whereupon the carrier arm 110 retracts, from the position of Figure 5A to that of Figure 5, and any debris 34a that may be on the upper face of the member 42 is withdrawn, to the left in the showing, and is stripped from the slotted carrier arm 110 by means of the leaf spring 122 which extends into the slot 118. In Figure 1 this last mentioned operation may be seen with the debris shown as falling out of the carrier arm and downwardly for disposal by gravity or otherwise.

The lower and upper diaphragms 54 and 88, are ordinarily controlled by means of a supply of air or other fluid under pressure which passes through the valve mechanisms 55 and 89 respectively. These valve mechanisms may be of the solenoid operated type, and an electrical controller means (not shown in the drawings) will control the opening and closing of these valves, permitting the influx or exhaust of air to the diaphragms. In such cases where there is no direct supply of air furnished to the diaphragms to return them to the original or "at rest" position, this function is performed by the springs 51 and 87. Air may freely flow in or out through the members 59 and 94 so that exhaust may be provided to break the vacuum on retracting movement. The supply of air pressure to the chamber 102 through the valve 103 is controlled by the electrically operated mechanism 103a indicated in Figure 1.

It will be noted that during practically all of the operations of my invention in cutting and patching a sheet of veneer that the holding or clamping mechanism is constantly maintaining the sheet against the die to hold it in position during the punch cutting operation, as well as during the patching cycle.

The clamp means is so constructed that it surrounds the punch and also the area to be punch-cut and prevents breaking or cracking of the wood during the punching cycle. This is extremely important for, in fibrous wood as well

as in brittle sheets, if the material being cut were not firmly held it would tend to splinter and to crack and to otherwise destroy itself when the knife is brought downwardly to perform its shearing function. It is to be noted that the important operation of cutting the required area from a sheet of veneer stock is performed by a knife that moves and cooperates with a fixed die and that this cutting operation is not merely a punching or stamping operation but also a shearing operation. The former is impractical because of the large sheet being cut and because the material within the cut is usually weak and will not stand punching. The converse is true when the plug patch blank is cut to form a patching plug for in that case the stock is sufficiently strong to be forced upwardly against a fixed die due to the operation of the vertically rising plunger.

While I have shown as a preferred form of my invention, the use of air-operated diaphragms and piston mechanisms for the actuation of the various mechanical elements of my device it is to be understood that these form no important part of my invention as the combination of elements forming the cutting mechanism is the heart and soul of the invention.

I claim:

1. Sheet veneer cutting mechanism comprising a die block having a central opening provided with an upper and lower similar shearing edge, a clamp member adapted to secure a veneer sheet to said die block about the central opening, means for pressing said clamp member to said die block and means for retracting said clamp member from its pressing position, a reciprocal knife adapted to cooperate with said die block opening and the upper shearing edge to shear a portion of a veneer sheet clamped thereto, means for operating said knife, a clamp shoe to pass such a cut out portion from a veneer sheet through the central opening in the die block, means for positioning a patch blank of sheet veneer below said opening, a ram adapted to engage and force a portion of said blank through said die opening past the lower shearing edge whereby to cut said blank to the shape thereof, means for advancing said ram and cut blank through said die block opening to position the cut blank in the opening of a veneer sheet, said clamp shoe pressing the blank to hold it against the ram during the cutting operation and subsequent thereto while the cut blank is passed to position in said veneer sheet, the wall of said die block opening serving to prevent lateral expansion of the cut blank during its passage through the die block opening.

2. Sheet veneer cutting mechanism comprising a die block having a central opening provided with upper and lower shearing edges, a clamp member adapted to secure a veneer sheet to said die block about the central opening, means for pressing said clamp member to said die block and means for retracting said clamp member from its pressing position, a reciprocal knife adapted to cooperate with the upper shearing edge of said die block to shear a portion from a veneer sheet clamped thereto, means for operating said knife, means for passing such a cut out portion from a veneer sheet through the central opening in the die block, means for positioning a patch blank of sheet veneer below said opening, a ram adapted to engage and force a portion of said blank through said die opening past the lower shearing edge whereby to cut said blank, and means for advancing said ram through said block opening to position said cut blank in the opening of the veneer sheet.

3. Sheet veneer cutting mechanism comprising a die block having a central opening provided with similar upper and lower shearing edges, means for clamping the veneer sheet to the die block, a reciprocal knife adapted to cooperate with the upper shearing edge of said die block opening to shear a portion from a veneer sheet clamped thereto, means for operating said knife, means for positioning a patch blank of sheet veneer below said opening, a ram adapted to engage and force a portion of said blank through said opening and past the lower shearing edge whereby to cut said blank, and means for advancing said ram through said die block to position said cut blank in the opening of the veneer sheet.

4. A patching mechanism for veneer sheets comprising a die block having an opening therethrough provided with an upper and lower similar shearing edge, a clamp operable to hold a veneer sheet against one face of said die, a knife cooperating with said die opening and the upper shearing edge for punch cutting said veneer sheet, means for positioning a patch plug blank against the lower face of said die, a ram for forcing said patch plug blank against said die to trim it to the shape of the opening and to force it through said die, and means for holding said patch plug against the ram during its cutting period and during its passage through the opening in said die and while it is introduced into the cut out area of the veneer sheet being patched.

5. A patching mechanism for veneer sheets comprising a die block having an opening therethrough provided with upper and lower similar shearing edges, means for clamping a veneer sheet against the upper face of said die, means cooperating with said upper cutting edge for punch cutting said veneer sheet, means for positioning a patch plug blank against the lower face of said die, means for forcing said plug blank against said lower cutting edges to trim it to the shape of the opening, said means also serving to force the cut plug through said die and into the opening in the veneer, the wall of said die block opening being of a size to hold said patch plug against expansion or buckling during its cutting period and during its passage through the opening in said and while it is introduced into the cut out area of the veneer sheet being patched.

6. In a veneer patching machine, a cutting mechanism; comprising: a die block having similar shearing edges on the upper and lower faces of the block and a passage therethrough from edge to edge, means for clamping and means cooperating with one shearing edge for cutting a portion from a veneer sheet positioned on one face adjacent said edge of the die block, means for positioning a veneer blank adjacent the face of said die block, means cooperating with the other shearing edge for cutting a patch from said blank and for passing it through said passage for insertion into the cut opening in the veneer sheet, and means cooperating with said last mentioned means for preventing buckling of said patch during cutting and until insertion into the veneer sheet opening.

7. In a veneer patching machine, a cutting mechanism, comprising: a die block having similar shearing edges on the upper and lower faces of the block and a uniform passage therethrough

from edge to edge, means for clamping and means cooperating with one shearing edge for cutting a portion from a veneer sheet positioned on one face adjacent said edge of the die block, means for positioning a veneer blank adjacent the other face of said die block, means cooperating with the other shearing edge for cutting a patch from said blank and for passing it through said passage for insertion into the cut opening of the veneer sheet, and means cooperating with said last mentioned means for preventing buckling of said patch during cutting and until insertion into the veneer sheet opening, said passage walls being of a size to restrain the cut patch from lateral expansion during its travel through the die block.

8. In a veneer patching machine, a cutting mechanism, comprising: a die block having similar shearing edges on the upper and lower faces of the block and a uniform passage therethrough from edge to edge, means for clamping and means cooperating with one shearing edge for cutting a portion from a veneer sheet positioned on one face adjacent one cutting edge of the die block, means for positioning a veneer blank adjacent the other face of said die block, a ram cooperating with the other shearing edge for cutting a patch from said blank against the other cutting edge and for passing it through said passage for insertion into the opening in the veneer sheet, and presser means for cooperating with said ram to prevent buckling of said patch during cutting and until insertion into the veneer sheet.

PER F. SKOOG.

(p. 24)

PLAINTIFFS EXHIBIT C

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METHOD OF PATCHING VENEER SHEETS

Original Filed April 21, 1941 3 Sheets-Sheet 1

FIG_3

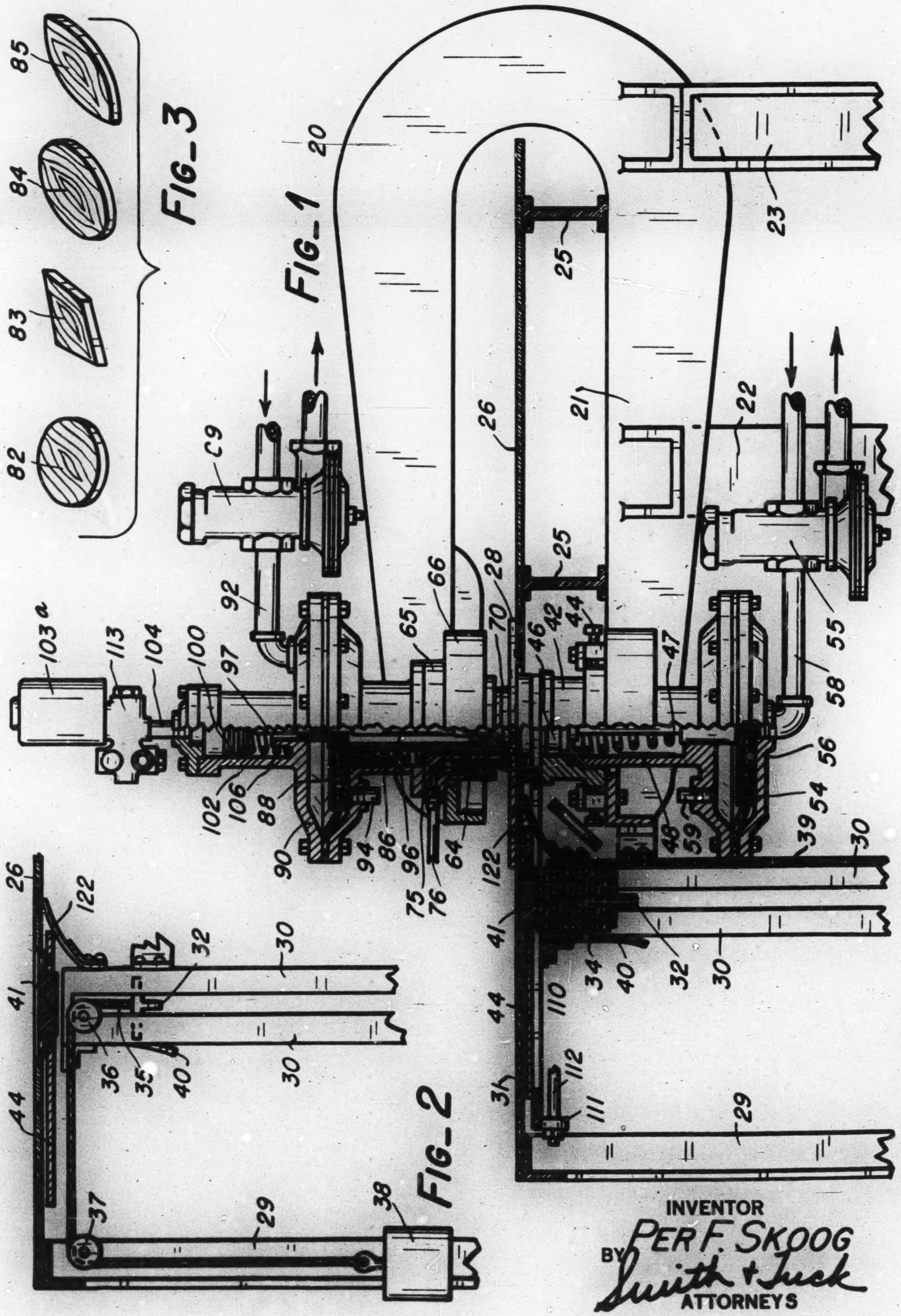

FIG_1

FIG_2

INVENTOR
PER F. SKOOG
BY Smith & Luck
ATTORNEYS

Dec. 14, 1943. (p.25) P. F. SKOOG 2,336,703

METHOD OF PATCHING VENEER SHEETS

Original Filed April 21, 1941 3 Sheets-Sheet 2

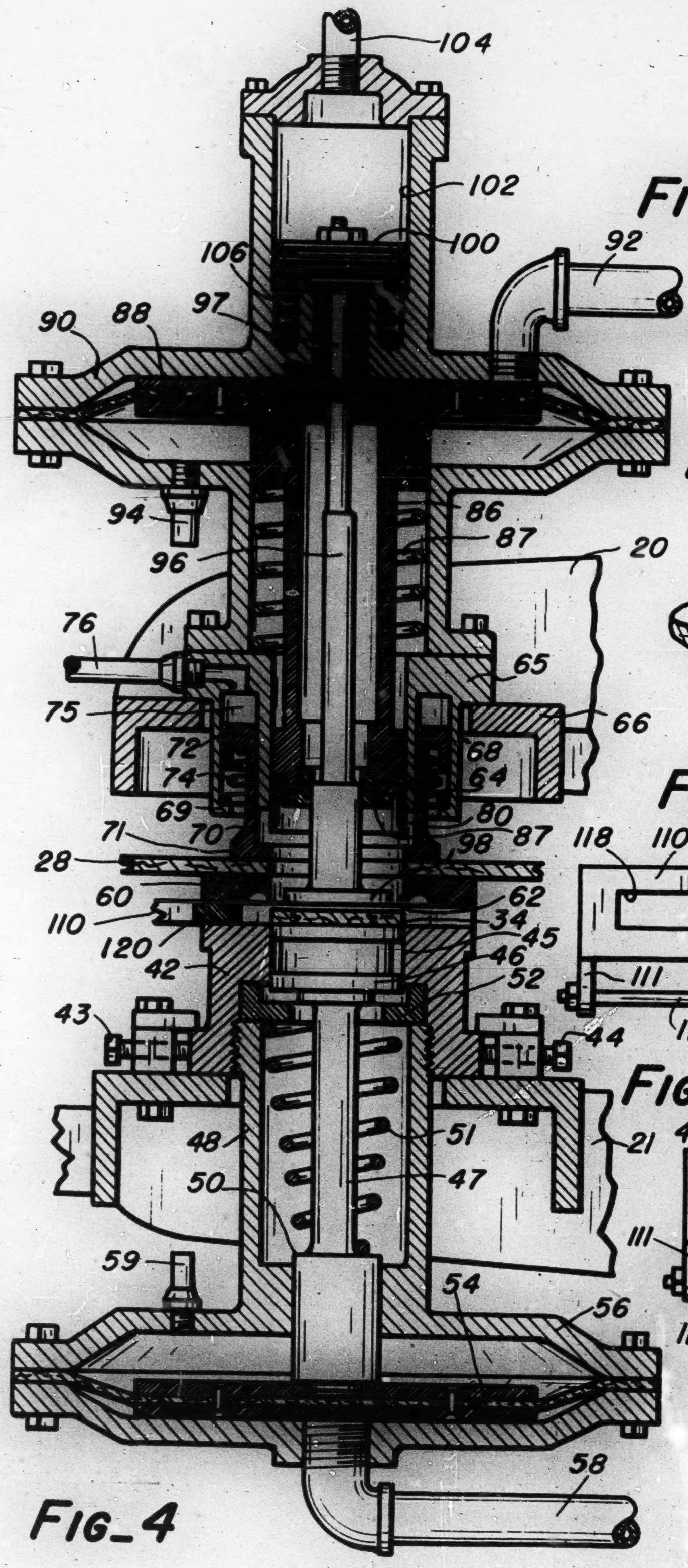

FIG_4

FIG_6

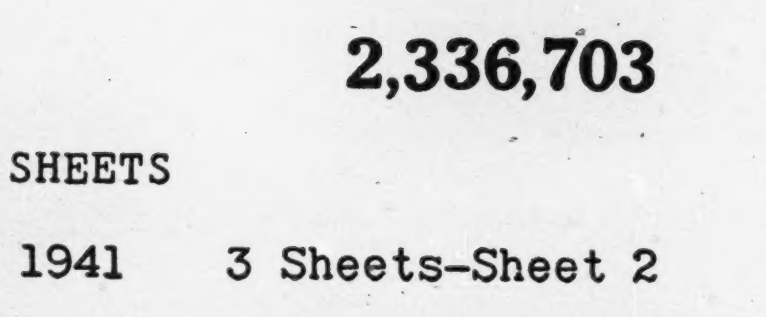

FIG_7

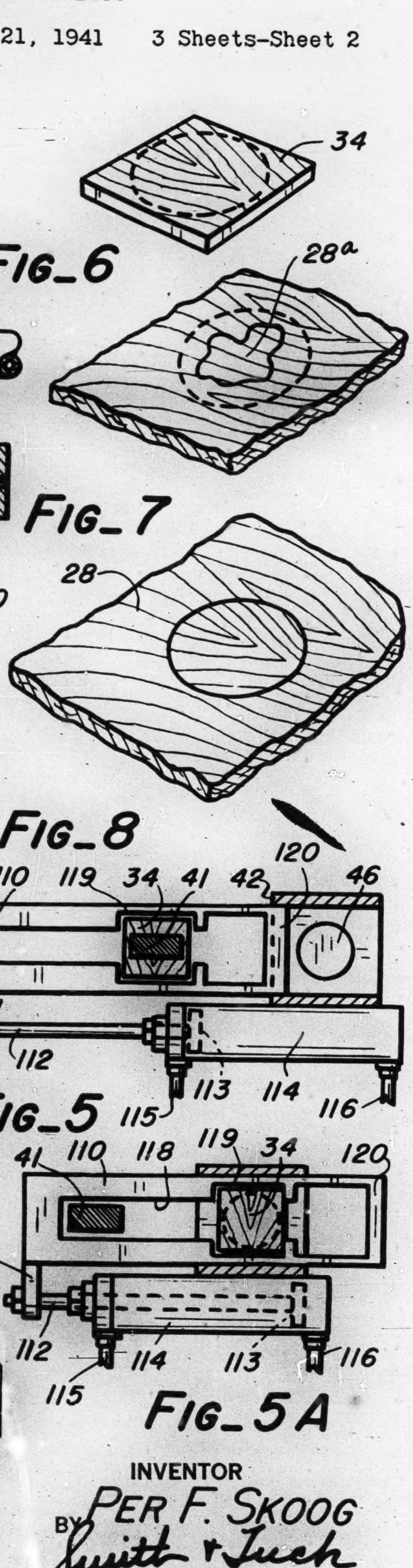

FIG_8

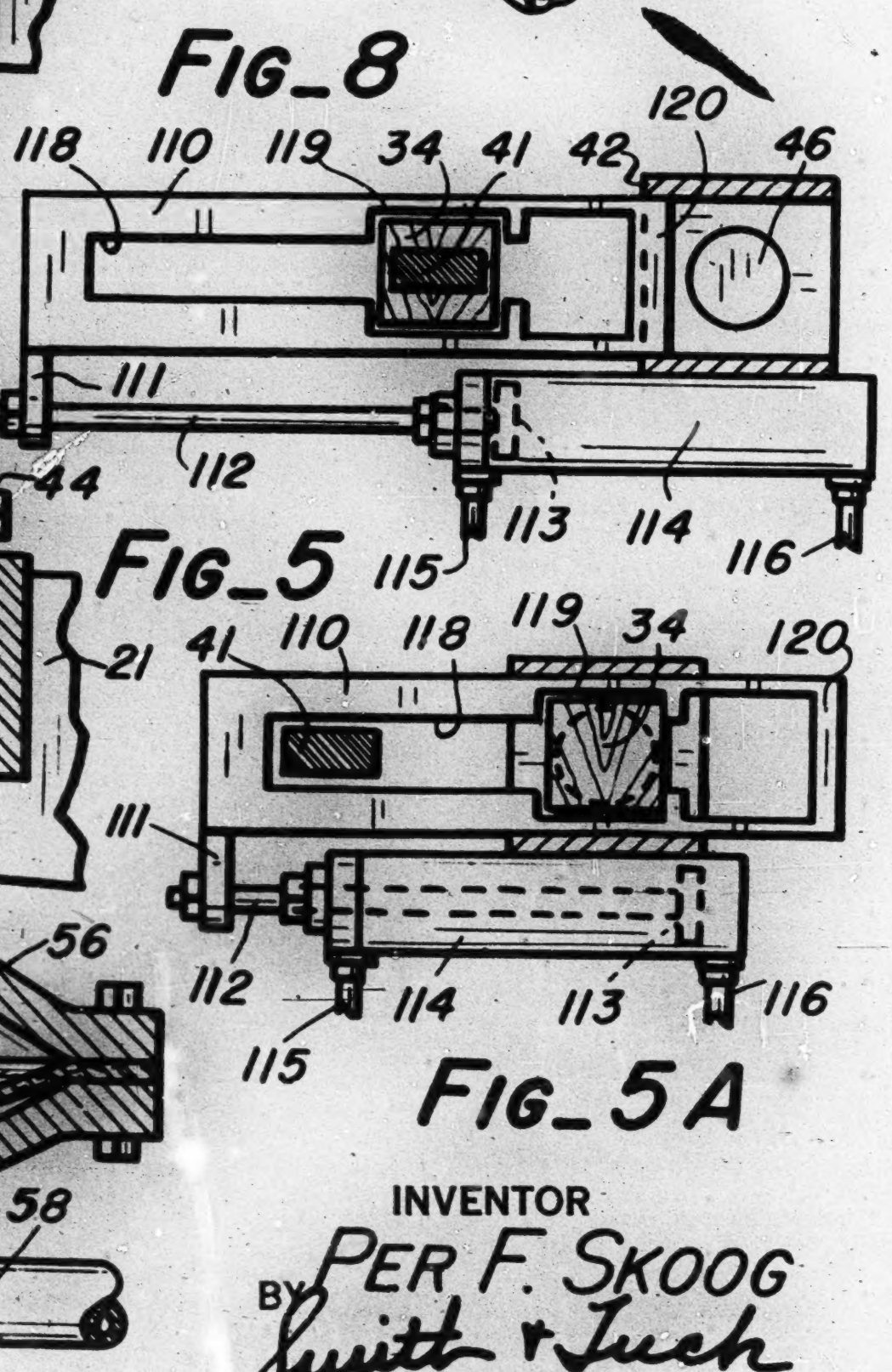

FIG_5

FIG_5A

INVENTOR
PER F. SKOOG
BY Smith & Tuck
ATTORNEYS

(P.26)

Dec. 14, 1943. P. F. SKOOG 2,336,703

METHOD OF PATCHING VENEER SHEETS

Original Filed April 21, 1941 3 Sheets-Sheet 3

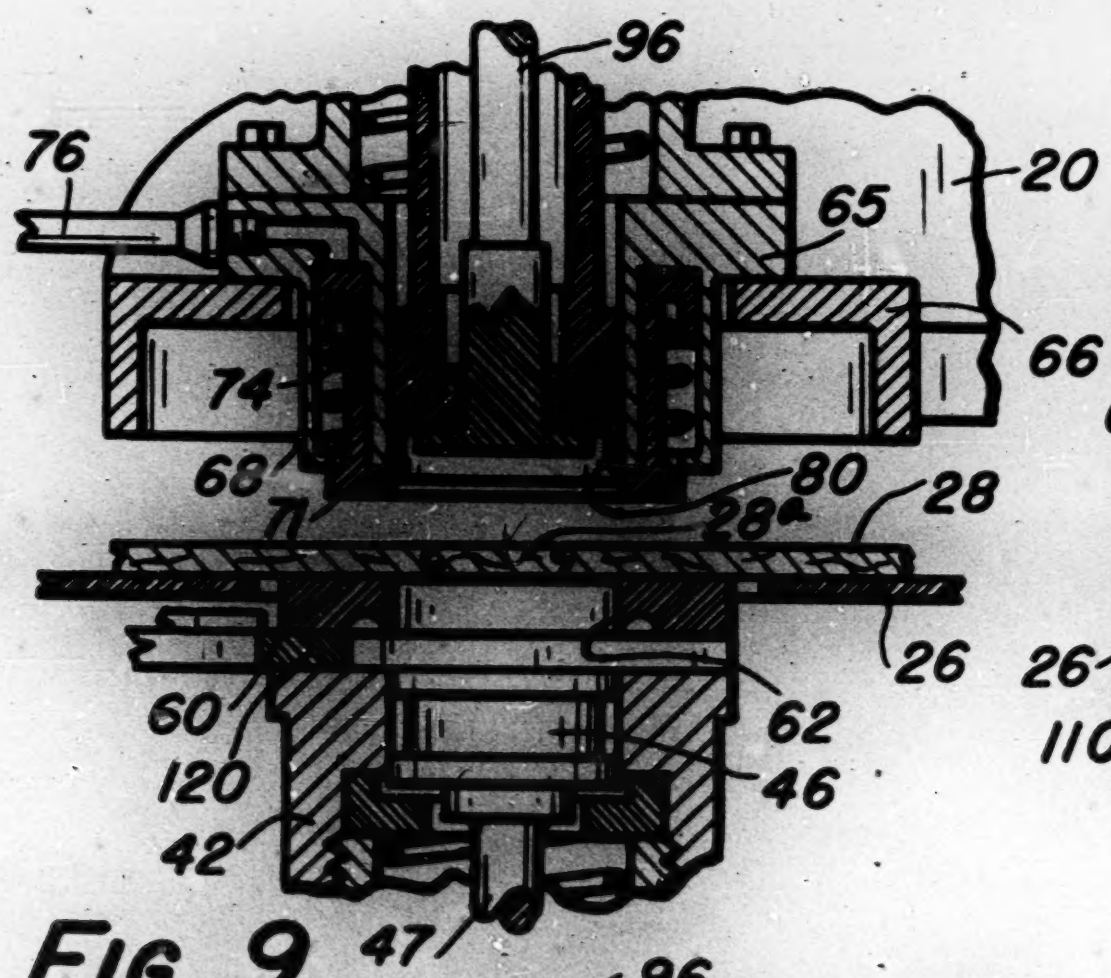

FIG_9

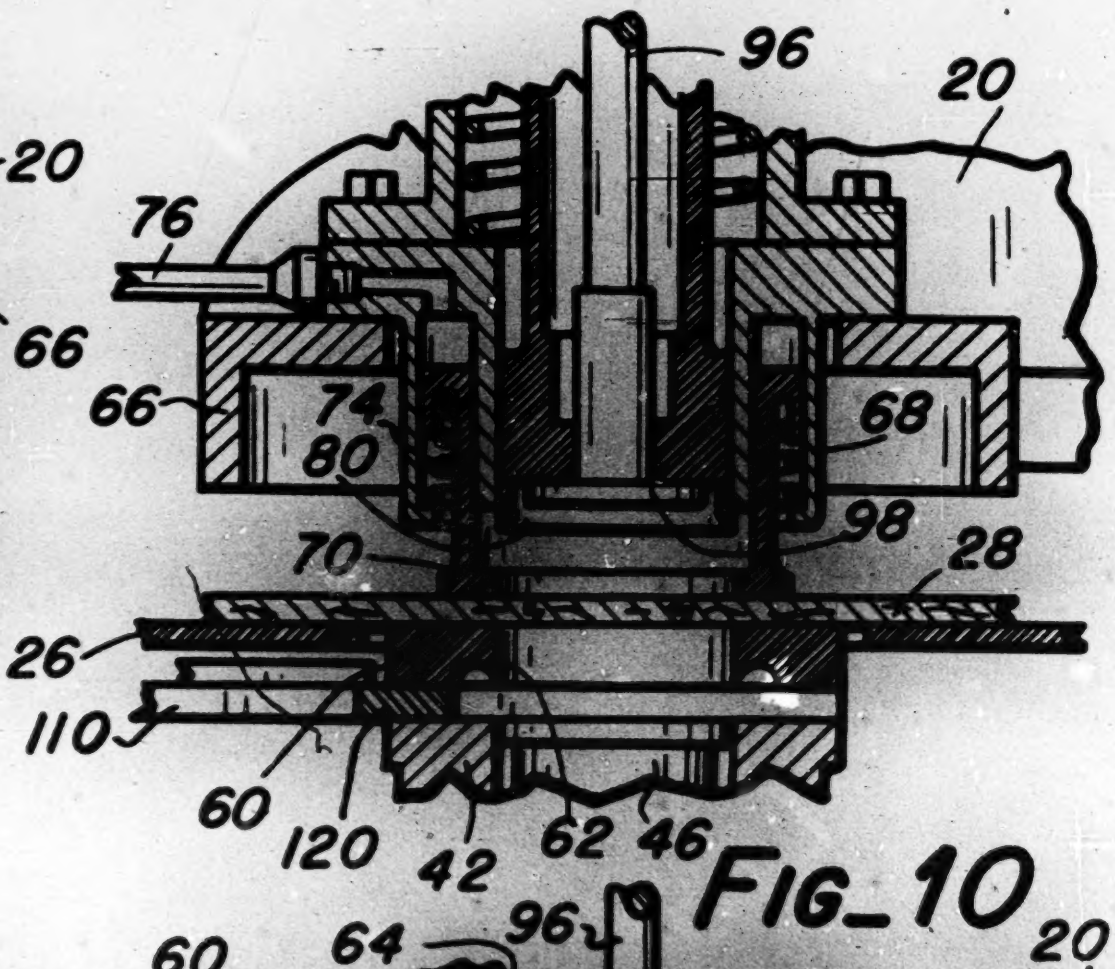

FIG_10

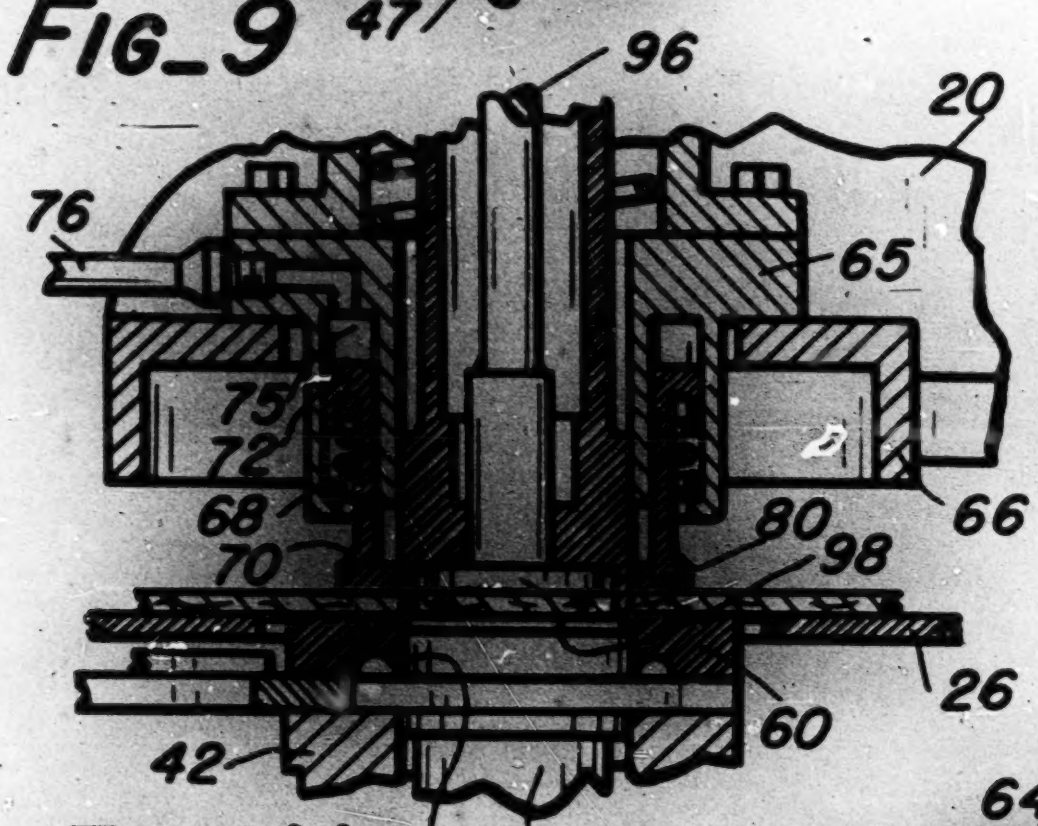

FIG_11

FIG_12

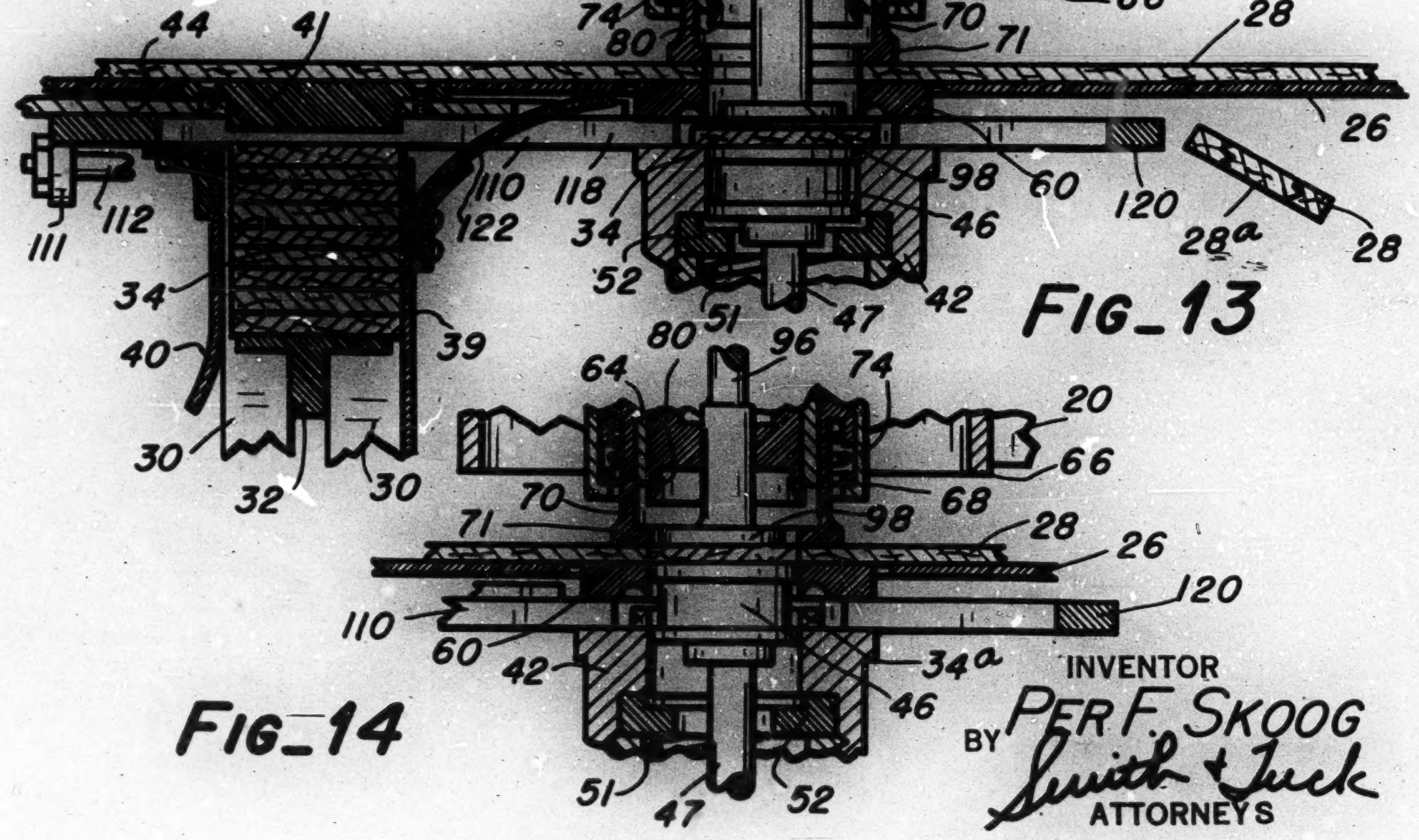

FIG_13

FIG_14

INVENTOR
PER F. SKOOG
BY Smith & Luck
ATTORNEYS

Patented Dec. 14, 1943

2,336,703

(p. 27)

UNITED STATES PATENT OFFICE

2,336,703

METHOD OF PATCHING VENEER SHEETS

Per F. Skoog, Bellingham, Wash., assignor to Olympia Plywood Machinery Corporation, Olympia, Wash.

Original application April 21, 1941, Serial No. 389,533. Divided and this application September 29, 1941, Serial No. 412,868

4 Claims. (Cl. 144—309)

This invention relates to an improved method of patching veneer sheets and is particularly adapted for use in the patching of thin wood veneer such as is produced in the lumber industry. In the practice of peeling logs, as compared to the older method of slicing the wood, to form veneer sheets it is common to have certain pieces that are defective by reason of the fact that they have disfiguring knots or other marred areas.

This application is a division of application Serial Number 389,533, filed by me April 21, 1941, which is co-pending at this time in the United States Patent Office.

Ordinarily the patching and salvaging of such stock is a manual operation that requires a great amount of labor and is never satisfactorily done by hand. A suitable mechanically operable salvage means and method to effect such patching is desirable as such stock is usually of such low grade that it is unusable in the manufacture of plywood of the standard or better grades. In manually patching veneer stock it is customary for a workman to cut by hand with a sharp knife, a boatshaped patch, or to cut a round patch by the use of a rotary saw. Subsequently, usually at another location a patch is cut from a piece of similar patching stock. This patch is placed in position where it is glued in the cutout area from which the marred veneer has been removed. This forming of patching is usually a three-step operation, the first being the cutting operation, the second being the formation of a patch suitable to fit in the cut-out portion, and the third the placement of the patch and its gluing into the stock being patched.

Ordinarily such patching operations are formed in a series of steps along a table set aside for that purpose. A considerable amount of time is consumed in effecting such patching. Patching is not, therefore, very satisfactory by this method because ordinarily it does not raise the grade sufficiently to extend any material advantage to the industry to offset the cost. As a result much good material can only command a relatively low sale price.

An important object of my invention is the provision of method and means for patching veneer sheets wherein the operation may be carried on at a single position and with great rapidity and efficiency.

Another object of my invention has been the provision of means for making a patch in veneer stock wherein the preparation of the material to be patched, the cutting of the patch, and the placement of the patch, is performed in a series of sequenial steps all encompassed within a brief moment required for the operation.

A further object of my invention comprises the provision of a method of cutting a patching plug plank to the size and shape of a punch-cut area to be patched and inserting that cut plug into said area while always maintaining the plug compressed against edgewise expansion and warping so that when the plug is finally placed it will securely engage in the area that is patched.

Still another object of my invention relates to the provision of means for punch-cutting a marred area in sheet veneer which means will clamp such sheet about the marred area and hold it throughout the cutting and patching steps of my method.

Another and further object of my invention relates to the provision of means for cutting and compressing a plug for placement in a veneer sheet while maintaining that cut plug against buckling or expansion as it passes through a cutting die, at one edge of which the plug is cut, until it is inserted into the area being patched.

A further object of my invention is the provision of plug-cutting and patching mechanism which is simple to manufacture and easy to assemble and capable of constant use with a minimum of maintenance and repair, and which mechanism may be operated under electrically controlled, timed valving mechanism or the equivalent.

Other objects and advantages of the invention will be apparent in the course of the following description wherein I have described a preferred form of my invention as shown in the accompanying drawings.

Figure 1 is a detailed assembly view of my plug-cutting and patching mechanism with portions shown in section and portions omitted for convenience of illustration.

Figure 2 illustrates the mechanism by which plug blanks are constantly fed for introduction into the patching mechanism,

Figure 3 is a bracketed view showing various types of plug which may be cut for use in patching operations practiced according to my described invention,

Figure 4 is an enlarged vertical sectional view of the principal elements of the plug-cutting and patching mechanism together with the operating parts therefor,

Figures 5 and 5A show sequentially in plan the plug blank feeding mechanism as utilized in my mechanism,

Figure 6 is a perspective view of a plug blank,

Figure 7 is a perspective view of a portion of a veneer sheet indicating a marked area to be patched and indicating, in dashed lines, the portion that will be cut therefrom and subsequently patched,

Figure 8 is a perspective view of a fragment of a veneer sheet after the patching operation has been completed,

Figures 9, 10, 11, 12, 13, and 14 are fragmentary sectional views illustrating the movements of the various parts and the various steps of my method and means for patching veneer sheets.

Referring to the drawings, throughout which like reference characters indicate like parts, numeral 20 designates a horseshoe-shaped frame member utilized for supporting the mechanism I have devised for cutting plug patches for veneer sheets. The lower arm 21 of the frame member 20 is supported upon suitable legs 22 and 23 that may be mounted upon a work floor, the showing of the actual footing being eliminated for convenience of illustration.

By means of suitable structural members 25 a web table 26 is disposed within the arms of the frame 20 in a horizontal position for the reception of a sheet of veneer stock 28 that may be laid thereon for patching. While I have shown the sheet 28 as being of relatively small size it will be understood that it is intended that this mechanism is for the patching of extremely large size veneer sheets of the nature that are now commonly being cut in veneer plants.

Positioned adjacent the mouth of the frame member 20 is a pair of supporting legs 29 and 30, 30 which mount the table element 31 that is aligned horizontally with the table element 26. The legs 30, 30 are spaced apart and a vertically movable lifter bar 32 is guided therebetween. Bar 32 supports a plurality of plug patch blanks 34 as indicated in Figure 1. At its end member 32 has coupled thereto a cord or cable 35 that passes over sheaves 36 and 37 and has attached thereto a weight 38 that hangs at some remote point and constantly urges the member 32 upwardly. The blanks 34, resting on bar 32, are aligned on their forward edges against the plate 39 and on their rear edge they are kept in alignment by means of the shoe 40.

As the individual members of the group of plug blanks supported by the bar 32 are forced upwardly they come against the bottom face of stop block 41 that is positioned in a hole in plate 44 that is disposed just under the table 31.

Supported on the lower arm 21 of the frame member 20 is a base block 42 that is adapted to be shifted for very careful adjustment by a suitable screw mechanism for proper positioning in alignment with other parts of my device which is ordinarily mounted directly thereabove for cutting and patching veneer sheets. For example the block 42 may be shifted longitudinally by backing off adjustment screw 43 while advancing a similar adjustment screw 44.

Fitted into an opening 45 within the base-block 42 is a ram or plunger member 46 that has a shank 47 extending downwardly therefrom into a chamber in the cylinder 48 which depends from the base member 42. The shank 47 is shouldered at 50 and a coil spring 51 encircling the shank is seated between the flange ring 52 in the upper portion of the chamber and the shoulder 50 below to constantly urge the member 46 downward. At its lower end the shank 47 is associated with the diaphragm 54 in the diaphragm chamber or housing 56 to which air or other fluid pressure means may be supplied and exhausted by means of the tube 58 and vent 59.

Above the base member 42 is a cutting die 60 which has an interior passage 62 that is normally aligned with the opening 45 on the base 42. The die 60 is so formed that it has a cutting or shearing edge at its upper end as well as one on its lower end of the opening 62.

On the upper arm of the frame 20 is mounted a cylinder 64 having an upper flange 65 that rests upon a suitable support member 66 associated with the arm. An auxiliary cylinder 68 depends also from flange 65 and encloses in spaced relation the cylinder 64. Positioned therebetween is the clamping shoe 70 having a foot 71 and an enlarged head 72 adapted to close the area between the cylindrical walls 64 and 68. An expansion coil spring 74 is positioned between a flange 69 on the cylindrical wall 68 and the under side of the head 72 of the clamp member 70 and constantly urges the member 70 upwardly.

Air supplied to the chamber 75 through the conduit 76 will permit the downward extrusion of the clamping member 70 into a clamping position upon a sheet of veneer stock indicated by the numeral 28.

Mounted for sliding movement in the inner face of the wall 64 is a knife member 80 which will hereinafter be described as circular although it will be apparent that the shape of the knife may conform to the shape of any of the patch plugs that are suggested in the bracketed view of Figure 3. For example the circular plug 82 could be cut by the member 80, whereas a diamond-shaped plug 83, an oval plug 84, or a boat-shaped plug 85 would be cut by tools shaped for that purpose.

The knife member 80 is engaged on the lower end of a tube 86 and is held in place by means of the nut 87. The upper end of the tube 86 is associated with the diaphragm 88 in the housing 90 to which air or other fluid under pressure may be supplied and from which it may be exhausted by means of the tubes 92 and 94.

A vertically movable shank 96 is slidably mounted in the nut member 87 and in an upper journal extension 97 of the tube 86. On its lower end the shank 96 has the pressure foot or shoe 98 that, in the case of the circular knife or cutter 80, is slightly smaller in diameter and adapted to be enclosed thereby on occasion.

On the upper end, shank 96 has the piston 100 mounted in the cylinder 102 to which air under pressure may be supplied through the conduit 104.

The piston 100 is normally urged upwardly as is also the shank 96 and the shoe 98 by means of a coil spring 106 positioned between the under side of the piston and the bottom of the piston chamber.

For introducing a plug-blank 34 to the under side of the die 60 or between member 42 and member 80 I employ the transversely slidable carrier bar 110 which has an offset arm 111 to which may be connected the rod 112 of the piston 113 within the chamber 114. The piston 113 may be moved either to the right or to the left, as seen in Figures 5 and 5A by air or other fluid under pressure supplied to the tubes 115 and 116.

A slot 118 in the carrier bar is provided and has sufficient width to fit either side of the hold-down member 42 and to slide on either side of that member while at the same time advancing one of the plug-blanks 34 in the opening 119 in

Associated's lawyers knew the late Judge Charles H. Leavy, the judge of that court, had just retired after a long illness and that it was highly improbable that a successor would be appointed until after the November 1952 election.

On August 28, Associated filed its answer to Prentice's complaint filed in this court and it also filed a cross complaint in which it demanded damages for infringement and unfair competition in the sum of at least $50,000 actual damages and three times its actual damages because of the wanton and willful character of such infringement. Associated demanded a jury on all issues of fact raised by its answer and cross complaint.

On September 12, 1952, Prentice filed its answer to Associated's cross complaint. In it, Prentice alleged: (a) anticipation by prior art, (b) no invention, (c) public knowledge of the Raimann machine in the United States, and (d) prior publications of the Raimann machine in foreign publications. Prentice attached a list and description of the patents on which it relied to show anticipation and no invention and a list of foreign publications in which the accused Raimann machine was described, two of which were published in the year 1938.

On September 22, this case was assigned an October 20 pretrial date.

On September 29, 1952, Prentice filed an amendment to its answer in which it set up the further defense that the accused machine was "on sale"

in the United States more than one year prior to the applications for the Skoog patents.

On the same day, Prentice filed its motion for a preliminary injunction to restrain Associated from taking any further steps in the prosecution of its action against Buffelen Manufacturing Company, until final adjudication of this action and to enjoin Associated from threatening to commence, or from commencing, any action against any of its other customers for alleged infringement of the Skoog patents until this case was decided.

In an affidavit filed by Associated in opposition to the motion for a preliminary injunction, it alleged that Prentice did not have a published Dun and Bradstreet rating and, on information and belief, alleged that Prentice was financially unable to respond in damages. Associated further alleged that it was losing approximately $500 per month by reason of the loss of royalties on machines sold by Prentice. In the alternative, Associated requested that, if the Prentice motion for preliminary injunction were granted, it should be done only upon the condition that Prentice post a $10,000 bond.

On October 10, when the deposition of Per F. Skoog was taken, he was shown publications, all printed during or prior to the year 1938, which contained pictures or drawings and descriptions of the accused Raimann machine and, in some instances, the manner in which the accused Raimann machine operated.

On October 13, the motion for a preliminary in-

junction came on for hearing. Associated's lawyer opposed the granting of the preliminary injunction and argued that Associated should be permitted to proceed against Buffelen and other firms using the Raimann machine. I mentioned Judge Leavy's retirement and subsequent death and the improbability of the Buffelen case being tried prior to the date upon which this case could be tried, particularly in view of the fact that I was willing to give him an early trial date.

Associated's lawyer objected to an early trial date. He claimed that he and the other members of his firm were busy preparing other cases for trial. Upon learning that none of the other cases had been set for trial and that he could devote all of his time to this case, if necessary, I granted the temporary injunction and I set the case for trial November 5.

On October 16, Associated filed a motion to vacate the order granting the preliminary injunction on the ground that Judge Edward Murphy had been assigned to the United States District Court for the Western District of Washington, Northern Division, for a period of 90 days and that it could reasonably be anticipated that an early trial date could be had on the case filed by Associated against the Buffelen Manufacturing Company. This motion, however, was never pressed by Associated and was subsequently denied.

On October 18, 1952, the deposition of H. K. Von Maltitz, a Chicago equipment dealer, was taken. Von Maltitz testified that he offered to sell

Raimann machines to the plywood industry in various parts of the country, including the West Coast, during and prior to 1939. Copies of the witness' correspondence with the Raimann Company during the period from 1936 to 1939, together with catalogues, pictures and descriptions of the Raimann machine which he received during that period, were marked and displayed to Associated's chief trial counsel who cross examined the witness.

On October 27, the deposition of Henry C. Relf, the managing director of Pacific Forest Industries (hereinafter referred to as P.F.I.) was taken. Associated is a stockholder-member of the P.F.I., which is the export sales organization for a number of plywood manufacturers including Associated. It also brings to the attention of its members technical and other information of interest to the industry. Mr. Relf testified that, in December 1937 in Rotterdam, Holland, he met Mr. Raimann and that Mr. Raimann, at that time, explained generally the operation of the accused machine.

The files of the P.F.I., which were marked and offered, showed that there was considerable correspondence between Raimann and P.F.I. during the years 1938 and 1939 and that Raimann had sent to P.F.I. pictures, catalogues, and other advertising material which described the operation of the accused Raimann machine. Price lists and samples of the work performed by the machine were also in the P.F.I. file.

Although Mr. Relf testified that he knew of his own knowledge that some of the members of the

P.F.I. were told about the Raimann machine, he was unaware of all of the firms so contacted because Axel Oxholm, the former director of P.F.I. who had made the contacts, died in 1949.

On November 5, the trial was postponed for a period of one week to enable the parties to devote more time to the preparation of the pretrial order. On November 10, the pretrial hearing was held and at such time all, or practically all, the exhibits which each party intended to use in the trial were exhibited to opposing counsel. Although the pretrial order raised a number of issues, after consultation with the parties, I ordered the issues of infringement, validity and damages for infringement be segregated from the other issues and that only those issues would be submitted to the jury. The trial commenced on November 18.

During the trial, the file wrappers of the Skoog patents were introduced in evidence. They showed that all of Skoog's original claims were canceled by the examiner in his first report on the basis of the Raimann patent. Thereafter, in the prosecution of the Skoog patents, the inventor represented that there were two significant differences between the Skoog invention and the Raimann patent:

First, he claimed that, in his invention, unlike the Raimann patent, there was constant clamping of the veneer sheet from the time that the defective portion was removed until the patch was inserted in the cut-out area.

Second, he claimed that in his invention, unlike the Raimann patent, the entire operation was completed at one station.

Both of such representations were incorrect.

Even though the claims that were allowed in the Skoog patents were much narrower than those originally requested, the probabilities are that even these narrow claims would not have been allowed unless the Patent Office believed that the inventor's representations concerning the differences between the Skoog invention and the Raimann patent were correct.

It was undisputed that there were differences between the Raimann patent and the accused Raimann machines. Mr. Becker, the inventor of the Raimann machine, came from Germany for the trial. He testified that no Raimann machine was ever constructed identically with the Raimann patent; that, during the course of the construction of the Raimann machine, it became apparent that minor changes were necessary and that these changes were made in 1935 on the first machine that was ever produced. Mr. Becker further testified that he did not apply for additional patents on such improvements for the reason that he believed that such changes were not patentable because they were merely changes that any good mechanic, skilled in the art, would have found necessary and would have made. He introduced evidence to show that the machine as produced in 1935 was identical to the accused machine and was likewise identical to the machines that were adver-

tised and described in the printed publications beginning in 1936.

The trial was concluded on November 24, at which time the jury returned a general verdict in favor of Prentice. The following special verdict was also returned:

1. Does the Raimann patent either alone or in combination with the Anderson or Painchaud patents anticipate the Skoog patents? Yes X. No .....

2. Does the combination of elements and steps in the Skoog patents produce an unusual and surprising result? Yes ..... No X.

3. Was there public knowledge of the accused machine in the United States before the Skoog inventions? Yes X. No .....

4. Was the accused machine disclosed in publications before the Skoog inventions? Yes X. No ....

5. Was the accused machine "on sale" in the United States before the Skoog inventions? Yes X. No .....

In other words, the jury found against Associated on each of the issues submitted in the interrogatories, any one of which would have been sufficient to render the Skoog patents invalid.

Considering the record as a whole, I find that:

1. For some time prior to July 25, 1952, Associated knew that both the Skoog means and method patents were narrow improvement patents of doubtful validity.

2. Associated was earning a substantial income from the leasing of Skoog machines, which income was being threatened by the sale of the Raimann machines by Prentice.

3. Associated was reluctant to have the validity of the Skoog patents determined in a truly adversary court proceeding.

4. Associated knew that if it sued Prentice for patent infringement, Prentice would probably defend such action because the sale of Raimann machines had become one of its major sources of income.

5. Associated knew that it was unlikely that any customer of Prentice who had purchased one or two Raimann machines would defend a patent infringement suit because of the great expense that such a defense would entail.

6. Associated believed that, if it threatened enough customers of Prentice with patent infringement actions, Prentice, even if financially able, would not defend such actions, particularly if such customers required indemnity agreements.

7. Associated, when it sent letters to 29 of Prentice's customers threatening patent infringement actions and demanding damages, knew that such letters would effectively stop future sales of the Raimann machine and would probably require Prentice to inform its customers that it could neither defend them against such actions nor assume liability for damages in the event such cases were decided in favor of Associated.

8. Associated believed that by such letters it

could, with little expense to itself and without running the risk of having the validity of the Skoog patents determined in a court action:

a. Maintain its earnings from the leasing of Skoog machines.

b. Destroy its competition from the Raimann machines.

c. Obtain substantial royalties from the Raimann machines.

9. Associated was a member of Pacific Forest Industries for more than 15 years prior to 1951. Pacific Forest Industries, as well as a number of plywood manufacturing concerns on the Pacific Coast, knew that the accused Raimann machine was known in the United States and had been offered for sale in the United States long prior to the date upon which Skoog applied for his patents. Even if Associated was unaware of these facts, it could easily have obtained this information by communicating with Prentice or Raimann.

10. Even assuming that Associated did not have the knowledge and intent which I have attributed to it in paragraphs numbered 1 to 8, inclusive, the mailing of letters demanding damages and threatening patent infringement actions to 29 of Prentice's Raimann machine customers was a reckless act, particularly in view of the following facts:

a. The accused machines were produced by Raimann, the holder of the basic patent on an automatic veneer patching machine.

b. Associated's claim for infringement was based upon minor improvements to such type of machine.

c. The Skoog patents might be invalid for reasons not disclosed in the file wrappers of such patents.

d. Although Associated's investigation to determine validity extended over a period of 5 months, it was grossly inadequate.

e. Associated could have communicated with either Prentice or Raimann, or both of them, during such investigation and prior to the mailing of letters to Prentice's customers, without any financial loss, even if it developed that the Skoog patents were valid, and the Raimann machine infringed such patents.

f. Associated knew that Prentice would necessarily incur heavy financial losses by the mailing of such letters to Prentice's customers.

11. Even after Prentice filed this action, Associated still hoped that, by mailing additional letters and by filing infringement actions against customers of Prentice, it could accomplish its original purpose.

12. The disclosures made in the depositions of Von Maltitz and Relf and in the exhibits which were identified and displayed to Associated's attorneys at these and other depositions taken prior to the trial, should have made it abundantly clear that the Skoog patents were invalid for a number of reasons. However, in spite of these disclosures Associated continued to claim that the Skoog patents were valid and infringed by the Raimann machines.

Prentice was therefore required to incur additional expense in the further preparation and in the trial of this case which took more than 5 full days before a jury.

I appreciate that the granting of a patent by the United States Patent Office carries with it the presumption that the patent is valid. However, in my opinion, in spite of such presumption, the facts above set forth show that Associated was guilty of such unfairness and inequitable conduct that it would be grossly unjust for Prentice to bear the burden of its own attorney fees.

Prentice was represented by two attorneys, one an experienced patent lawyer with trial experience. $7,025 was requested for him. The other was an experienced office lawyer with little trial experience and no patent experience. $3,500 was requested for him. Both attorneys calculated their charges on the basis of $15 an hour for preparation and $175 a day for the trial. No charge was made for travel time and, although there were many court appearances, the hourly rate was applied except for the days actually spent in the trial.

In my opinion, however, there was some duplication of effort and, under all of the circumstances, I believe that a fee of $7,500 for both attorneys is the total amount that should properly be charged against Associated. Prentice may therefore have judgment against Associated for reasonable attorneys' fees in the sum of $7,500.

[Endorsed]: Filed July 30, 1953.

[Title of District Court and Cause.]

DEMAND FOR JURY

Plaintiff hereby demands trial by jury in this action.

/s/ J. PIERRE KOLISCH,
Attorney for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 3, 1953.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, subject to the approval of the Court, that the complaint be and the same is hereby amended by adding thereto the below numbered paragraphs. It is also stipulated that the answer of Defendants, Associated Plywood Mills, Inc., to the original complaint shall stand as the answer and denial to the amended complaint.

33. The public was injured by the illegal acts, leases, agreements, and conspiracies of defendants in that:

a. Defendants established a monopoly beginning in 1941 in the business of automatic veneer patchers and from this monopoly there flowed injuries to the public normally flowing from an illegal monopoly. Defendants were able to charge users of the machines as they saw fit and this cost was ultimately

borne by purchasers of plywood who paid for it in one form or another.

b. Because of the quality of peeler logs during the past fifteen years, the necessity for patching has increased, and plywood producers have had to acquire automatic patching machinery. Under normal competitive conditions, others would have gone into the business of manufacturing and selling such machinery. However, defendant's actions prevented others from so doing and obstructed the free flow of interstate commerce.

c. Instead of selling Skoog machines, defendants made the users rent them, and thereby exacted a continuing toll on the cost of production of patched plywood.

34. Plaintiff demands damages up to and including the date of trial in this action.

Date: September 15, 1954.

/s/ J. PIERRE KOLISCH,
Attorney for Plaintiff.

/s/ JAMES C. DEZENDORF,
Attorney for Defendant Associated Plywood Mills, Inc.

[Endorsed]: Filed September 15, 1954.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties

herein, subject to the approval of the Court, that the complaint be and the same is hereby amended by changing in the prayer the amount of judgment prayed for from $300,000 to $600,000.

It Is Also Stipulated that the answer of Defendant, Associated Plywood Mills, Inc., to the original complaint shall stand as the answer and denial to the amended complaint.

Date: January 5, 1955.

/s/ J. PIERRE KOLISCH,
Attorney for Plaintiff.

/s/ JAMES C. DEZENDORF,
Attorney for Defendant Associated Plywood Mills, Inc.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

SECOND AMENDED ANSWER OF DEFENDANT ASSOCIATED PLYWOOD MILLS, INC.

First Defense

The Amended Complaint fails to state a claim against defendant Associated Plywood Mills, Inc. upon which relief can be granted.

Second Defense

Defendant Associated Plywood Mills, Inc. admits the allegations contained in Paragraphs 2, 10, 15 and 28 of the Amended Complaint; alleges that it is without knowledge or information sufficient to

form a belief as to the truth of the allegations contained in Paragraphs 1, 3, 4, 5, 7, 11 and 21 of the Amended Complaint; answering Paragraph 8 of the Amended Complaint defendant Associated Plywood Mills, Inc. denies that plaintiff was damaged or suffered any injuries and admits the balance of said paragraph; answering Paragraphs 13, 14, 16 and 20 of the Amended Complaint, defendant Associated Plywood Mills, Inc. admits the execution and authenticity of the documents therein described; answering Paragraphs 25, 27, 30 and 31 of the Amended Complaint, defendant Associated Plywood Mills, Inc. admits the filing of the suit therein, the returning of the verdict, the handing down of the opinion, the entry of the judgment, the absence of an appeal and the satisfaction of the judgment therein described; and denies each and every other allegation contained in the Amended Complaint.

Third Defense

An earlier proceeding before this Court entitled "E. V. Prentice Machinery Co., plaintiff, vs. Associated Plywood Mills, Inc., defendant," Civil No. 6579, referred to in plaintiff's Amended Complaint herein, was between the same parties and arose out of the transaction or occurrence which is the subject matter of plaintiff's claims herein. The facts relating to plaintiff's present claims were set forth in plaintiff's reply to defendant's answer in said proceeding as an affirmative defense thereto, but no counterclaim was set forth in said pleading, and the claims now asserted by plaintiff in its Amended

Complaint, if any are stated therein upon which relief can be granted, were compulsory counterclaims in said proceeding under Rule 13(a) of the Federal Rules of Civil Procedure.

Fourth Defense

An earlier proceeding before this Court entitled "E. V. Prentice Machinery Co., plaintiff, vs. Associated Plywood Mills, Inc., defendant," Civil No. 6579, referred to in plaintiff's Amended Complaint herein, was between the same parties. Plaintiff asserted therein the same cause of action which is set forth in its Amended Complaint herein and pursued the same to final judgment in seeking and recovering an award of attorney's fees. Having litigated in Civil No. 6579 the same cause of action set forth in its Amended Complaint herein, this suit is barred by the doctrine of res judicata and estoppel by judgment.

Wherefore, defendant Associated Plywood Mills, Inc. having fully answered plaintiff's Amended Complaint, prays that plaintiff recover nothing thereby and that it have and recover judgment against plaintiff for its cost sand disbursements herein incurred.

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

Attorneys for Defendant Associated Plywood Mills, Inc.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

ORDER

The motion of defendant Associated Plywood Mills, Inc. for an order permitting it to file the second amended answer came on regularly for hearing before the undersigned Judge of the above entitled Court on Monday, March 7, 1955 at 10:00 o'clock a.m.

Plaintiff appeared by and through J. Pierre Kolisch, of its attorneys. Defendant Associated Plywood Mills, Inc., appeared by and through James C. Dezendorf, one of its attorneys. Argument of counsel having been heard and the Court being fully advised, the motion of defendant Associated Plywood Mills, Inc., for permission to file a second amended answer be and the same is hereby allowed.

After the ruling of the Court as aforesaid, Mr. Dezendorf called the Court's attention to the fact that plaintiff had not yet taken a dismissal as to defendants Skoog Engineering Company, Per F. Skoog and Olaf Skoog, none of whom have been served, although the Court had indicated previously that a dismissal should be taken as to them. The Court then inquired of plaintiff's counsel whether there was any reason to keep Skoog Engineering Company, Per F. Skoog and Olaf Skoog as parties defendant, to which plaintiff's counsel replied that plaintiff was not interested in keeping them in as parties, whereupon the Court on its own motion dismissed the complaint as to defendants Skoog En-

gineering Company, Per F. Skoog and Olaf Skoog, and ordered them eliminated as parties defendant herein.

Dated at Portland, Oregon, this 7th day of March, 1955.

/s/ GUS J. SOLOMON,
District Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 8, 1955.

[Title of District Court and Cause.]

OPINION

August 16, 1955

Solomon, Judge:

In a prior action between the same parties, plaintiff sought to obtain a declaration that certain patents owned by the defendant were invalid. Defendant in that action demanded substantial damages against plaintiff for alleged infringement of defendant's patents on automatic veneer patching machines, and plaintiff, as a defense to this claim for damages, asserted invalidity of defendant's patents and no infringement. In addition to these and other defenses, plaintiff claimed that the defendant was guilty of patent misuse, in that it was attempting to extend its patent monopoly into unpatented goods.

By order of court, the case was tried on the segregated issues of validity and infringement. The

jury found the defendant's patents were invalid on five separate grounds.

Thereafter, the plaintiff applied for an allowance of attorney's fees, in accordance with 35 USCA § 70. After a hearing, I found that "Associated was guilty of such unfairness and inequitable conduct that it would be grossly unjust for Prentice to bear the burden of its own attorney fees." I, therefore, awarded plaintiff attorney's fees in the sum of $7,500.00. A full statement of the history of this litigation, as well as the findings and reasons for the award of attorney's fees are set out in my opinion reported in E. V. Prentice Co. v. Associated Plywood Mills (1953), 113 F. Supp. 182.

In the present action, plaintiff seeks to recover treble damages against Associated (and other non-resident defendants upon whom service was not obtained) for alleged violations of §§ 1 and 2 of the Sherman Anti-Trust Act and § 3 of the Clayton Act.

On May 27, 1955, I ordered that the issue of

Whether the present action is barred by the doctrines of res judicata and merger and because plaintiff has split its cause of action

should be segregated from the other issues in the case and decided prior to trial.

In that order, I agreed to review the order which I previously entered overruling defendant's motion for summary judgment. This motion was based upon defendant's contention that the claim for damages asserted in this case should have been asserted in the prior case because it was a com-

pulsory counteraction under Rule 13(a) of the Federal Rules of Civil Procedure.

In my opinion, a claim for damages under the Sherman and Clayton Acts is not a compulsory counterclaim which the plaintiff was required to assert in the prior case and the judgment in the prior case is not res judicata as to the issue of damages.

I am also of the opinion that the cause of action asserted in this case is separate and distinct from the cause of action litigated in the prior case, including the allowance of attorney's fees, and that plaintiff by maintaining the present proceedings has not split a single cause of action.

Comment

I previously denied defendant's motion for a summary judgment on the authority of Mercoid Corp. v. Mid-Continent Inv. Co., 320 U. S. 661, 64 S. Ct. 268. In that case, Mercoid was accused of contributory infringement of a patent. In its answer, Mercoid denied such infringement, alleged that Mid-Continent should be barred from relief on equitable grounds, and counterclaimed for treble damages on the ground that Mid-Continent had conspired to expand the monopoly of the patent in violation of the anti-trust laws.

Mid-Continent contended that Mercoid could not maintain its counterclaim for damages because in a prior case involving validity and infringement, Mercoid provided the defense and was therefore barred "as respect issues which were actually liti-

gated and all issues which might have been raised in that earlier suit."

The majority of the court, speaking through Mr. Justice Douglas, rejected that contention. The following excerpt sets forth the reasons.

> "* * * Though Mercoid was barred in the present case from asserting any defense which might have been interposed in the earlier litigation, it would not follow that its counterclaim for damages would likewise be barred. That claim for damages is more than a defense; it is a separate statutory cause of action. The fact that it might have been asserted as a counterclaim in the prior suit by reason of Rule 13(b) of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment res judicata as respects it. Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252; Larsen v. Northland Transporation Co., 292 U. S. 20. And see Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 26-28; Restatement of the Law of Judgments, § 58. The case is then governed by the principle that where the second cause of action between the parties is upon a different claim the prior judgment is res judicata not as to issues which might have been tendered but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' Cromwell v. County of Sac., 94 U. S. 351, 353. * * *"

Although this portion of the court's opinion has been criticized in law reviews (Wright, The Compulsory Counterclaim Under Modern Pleading, 38 Minn. L. Rev. 420), in textbooks [Moore's Federal Practice (2d Ed.) ¶ 13.13], and in lower court decisions [Douglas v. Wisconsin Alumni Research Foundation (1948), 81 F. Supp. 167], and although other courts have either ignored or have attempted to limit Mercoid's application [United Artists Corp. v. Masterpiece Productions, 221 F. 2d 213 (5th Circ. 1955); E. J. Korvette Co., v. The Parker Pen Co., CCH 68034 (D.C. N.Y. April 23, 1955)], the Supreme Court has neither reversed itself, nor has it limited the reach of this portion of its holding. Many courts, some reluctantly (Douglas v. Wisconsin Alumni Research Foundation, supra) and others enthusiastically (Gasswint v. Clapper, 17 F.R.D. 309 (D.C. Mo. 1955)], have followed it.

In my view the decision in Mercoid is sound and, as applied to the facts in this case, any other holding would be contrary to the whole purpose and spirit of the Federal Rules of Civil Procedure.

I am also of the opinion that there is no merit in defendant's contention that plaintiff, having claimed statutory attorney's fees after the jury found in its favor on the segregated issue of the validity and having been awarded attorney's fees, may not seek to recover damages.

Plaintiff was awarded attorney's fees pursuant to 35 USCA § 70, which provides:

"The court may in its discretion award reason-

able attorney's fees to the prevailing party upon the entry of judgment in any patent case." [1]

At the hearing, both parties agreed that the construction given to this section by the court in Park-In Theatres v. Perkins, 190 F. 2d 137 (CCA 9, 1951), was proper and binding upon this court. In that case the court held:

> "The exercise of discretion in favor of such an allowance should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force, which makes it grossly unjust that the winner of the particular law suit be left to bear the burden of his own counsel fees which prevailing litigants normally bear."

The finding upon which the award of attorney's fees in the prior Prentice case was predicated, sets out a number of acts which are unrelated to a claim of patent misuse. Many of these acts, in and of themselves, would have justified the award.

In my view, an award of attorney's fees under such circumstances is not part of an action for damages under a statute which grants to a person who has been damaged by acts committed in violation of anti-trust laws, the right to recover from the wrongdoer "three-fold the damages by him

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[1] This section has now been replaced by 35 USCA § 285, which provides that "The court in exceptional cases may award reasonable attorney fees to the prevailing party."

sustained, and the cost of suit, including a reasonable attorney's fee."

By the order of May 27, 1955, there was also submitted to the court as a segregated issue the following question:

Is the defendant collaterally estopped from denying the findings contained in the court's opinion in the prior case, entered on April 17, 1953, in which the court allowed plaintiff attorney's fees, and is the judgment entered in that case res judicata in the present action?

I am not deciding this issue at this time because I believe defendant should have an opportunity to submit a statement of its present position with reference to this issue. If it desires to submit such statement, it should be supported by authorities and filed with the court on or before September 15, 1955.

Comment

At the conclusion of the oral argument, I expressed concern over the reach of a doctrine which would prevent plaintiff from maintaining an action for anti-trust violations, although it had never asserted such a claim before, merely because in a prior case between the same parties, plaintiff was successful in obtaining a judicial declaration that defendant's patent was invalid, and because in the same action the court allowed plaintiff attorney's fees pursuant to a statute.

At the same time, I expressed my concern over plaintiff's contention that the defendant is estopped from denying certain facts which are important in

the present action because the court in its opinion on the allowance of attorney's fees made certain findings of fact on issues not particularly raised by either party and which were not essential to the alllowance.

In spite of that fact, the defendant has elected to ignore that issue. In the briefs filed subsequent to the hearing, defendant merely reiterated its contention that the judgment and findings in the prior case are not only res judicata, but also a bar to the maintenance of this action for damages. I realize that having contended that the present action is barred because of res judicata, defendant might have been reluctant to contend that such doctrine is inapplicable in the event the court should find that the prior action is not a bar.

Since I have rejected defendant's contention that the claim is barred, I believe that the defendant should be permitted to examine its position in the light of such holding, and if it so desires, file a statement of its present position with reference to plaintiff's contention.

[Endorsed]: Filed Aug. 17, 1955.

[Title of District Court and Cause.]

STIPULATION AND ORDER

Upon the annexed consent of the attorneys for the respective parties, and upon the waiver of notice of settlement of order, and upon the motion of J. Pierre Kolisch, attorney for plaintiff, it is

Ordered that Prentice Machine Works, Inc., an Oregon corporation, be added as a party plaintiff herein, with the same force and effect as though it had been named in the original summons and complaint herein at the time of commencement of this action, and it is further;

Ordered that as and for a cause of action in behalf of the said plaintiff, Prentice Machine Works, Inc., that all of the allegations contained in the original complaint, and amendments thereto, in behalf of plaintiff, E. V. Prentice Machinery Co., be set forth at length as that of plaintiff, Prentice Machine Works, Inc., and it is further;

Ordered that the answer and amendments thereto of defendant, Associated Plywood Mills, Inc., in respect to the cause of action in behalf of plaintiff, Prentice Machine Works, Inc., is the same as set forth in respect to the cause of action of the original plaintiff, and it is further;

Ordered that the name of Prentice Machine Works, Inc., be added to the summons, complaint, and caption herein, and that the clerk of this court is hereby ordered to mark his records in this case accordingly.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed Oct. 4, 1955.

[Title of District Court and Cause.]

ORDER

Upon stipulation of the parties dated September 16, 1955, it is

Ordered that the complaint as amended is further amended by changing in the prayer the amount of judgment prayed for to the sum of One Million, Five Hundred Thousand Dollars ($1,500,000.00), and it is further Ordered that the answer of defendant, Associated Plywood Mills, Inc., to the original and amended complaint shall stand as the answer and denial to the complaint as amended in accordance with this order.

Dated: October 7th, 1955.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed Oct. 7, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

October 28, 1955

Now at this day It Is Ordered that the motion for a summary judgment herein be, and is hereby, denied.

[Letterhead of Ramsey and Kolisch.]

April 27, 1956

Hon. Gus Solomon
U. S. District Court House
Portland 5, Oregon

Re: Prentice v. Associated, Civil No. 7091

Dear Judge Solomon:

In looking through the transcript of the proceedings in this case, I was reminded that I had asked the Court for an opportunity to examine the books of Coe Manufacturing to determine the accuracy of the figures submitted to support defendant's exhibit 316 (Chart Comparing Sales of Prentice, Coe and Elliott Bay). I still believe that we should be afforded an opportunity to check the accuracy of the Coe figures, particularly since Mr. Conway, who testified concerning defendant's exhibit 214 (Coe figures), stated that he had never checked the accuracy of the figures but simply asked a bookkeeper to obtain them for him (R. 208). I appreciate (R. 198) that we did not object to defendant's exhibit 214 although we probably should have in view of the nature of this exhibit and Mr. Conway's testimony.

If you deny our request we would like to make a record on this point.

I am leaving this weekend for New York and will be gone for about two weeks.

Respectfully,

/s/ J. PIERRE KOLISCH,
For Ramsey and Kolisch.

JPK:cm
CC J. C. Dezendorf, Esq.

[Title of District Court and Cause.]

OPINION
September 29, 1956

Solomon, Judge:

I find that the plaintiffs did not suffer any damage by reason of the wrongful acts of the defendant, and defendant is therefore entitled to a judgment in its favor.

Comment

This is not a case in which plaintiffs were unable to prove the exact amount of damages which they suffered. It is a case in which plaintiffs failed to prove that they suffered any damage.

I appreciate the fact that it is unusual to disallow damages in a case in which plaintiffs claimed large damages and the defendant admitted liability. I had therefore hoped to be able to prepare an opinion for publication which would supplement the very interesting history of this action and the facts out of which it arose, which appear in my opinion in the prior case between the same parties. E. V. Prentice v. Associated Plywood Mills, 113 F. Supp. 182 (1953). I had also hoped to set forth in a more polished manner the reasons for my decision.

However, because of the press of other urgent work and because of the long delay that has already taken place, I must now announce my decision together with some of the reasons therefor. In the findings of fact that will be entered these reasons may be set forth with greater specificity.

At the commencement of this trial, I was of the opinion that the plaintiffs had suffered serious damage, and in the prior case, at page 184, I stated that the receipt of the Smith and Tuck letter of July 25, 1952, by Prentice's customers caused great consternation and "effectively stopped sales of Raimann machines, as well as other equipment sold or distributed by Prentice." This statement was based upon a representation made to me at the time that plaintiff's attorneys were resisting an application for a delay of the trial. I am now convinced that this statement was incorrect and that the representations made to me at that time were erroneous.

In order to prove damages, plaintiffs relied primarily upon the books and records of the company which showed the number of sales and the amount of business done from the inception of the business to the date of the trial and upon statistical studies made from these books and records. In this manner they attempted to show the amount of sales and the profits the plaintiffs would have made if the Smith and Tuck letter of July 25, 1952, had not been sent and if the litigation had not occurred.

Plaintiffs were unable to produce even one witness who could testify that he refused to purchase a Raimann machine or other equipment sold by plain-

tiffs by reason of the Smith and Tuck letter or by reason of the resulting litigation. Likewise, plaintiffs produced no evidence that the Skoog machine or any other automatic patcher replaced a single Raimann machine or that a Skoog or other patcher was sold or leased to a customer who was considering or who might have purchased a Raimann machine.

Plaintiffs' friend John Powers testified that in his opinion plaintiffs did lose business, but there was no factual basis for his opinion and he frankly admitted that the Smith and Tuck letter made no difference to him and that he purchased everything he intended to purchase from plaintiffs. One witness, Raymond J. Martin, testified that Martin Brothers Box Company, upon receipt of the letter, "held up tentatively any further purchases" but that after the litigation was concluded his company purchased three Raimann machines from the plaintiffs, which was all the machines it had ever contemplated purchasing. He also stated that the Smith and Tuck letter did not affect the purchases of other types of equipment and that his company bought no equipment from any other supplier by reason of the Smith and Tuck letter.

A statistical study employing the method of "least squares" was used as a substitute for specific evidence concerning lost sales. However, in order to make a projection which has any validity, this statistical method requires that one assume that the same conditions would be operative in the future as were operative in the past and that the deviations

about the line will be random; in other words, that the deviation around the trend for a particular month is independent from the deviation for every other month. Or stated differently, the "least squares" method can be legitimately used only in cases in which there is a mass market with random fluctuations without seasonal or cyclical variations unless the seasonal variations are uniform and can be removed.

The evidence in this case showed that this was not a mass market. The principal items sold from $9,000 or $10,000 each to more than $30,000 each. The sale of one piece of equipment often made the difference between a poor month and a good month, and the equipping of one mill could mean the difference between a poor year and a good one.

In the type of business in which plaintiffs are engaged, personal factors are of great importance. Plaintiffs testified as to the excellent reputation which their father enjoyed and of their wide acquaintance in the industry. Dave Prentice's membership on the Board of Directors of the Medford Veneer and Plywood Company was responsible for a substantial amount of business.

On the other hand, dissatisfaction by customers and suppliers are also important. The evidence showed that many of plaintiffs' customers were dissatisfied for a wide variety of reasons. Some of them did not like the equipment that had been sold to them (Exhibit 102, Roseburg Lumber Co. letter of February 5, 1952; Exhibit 166, Albany Veneer, Inc. letter of January 22, 1952; Exhibit 183, Pacific

Veneers, Inc. letter of September 17, 1952). Some of them thought that the plaintiffs' service was very bad. One customer, Mt. Baker Plywood, Inc., which during the year 1952 had purchased in excess of $72,000 in equipment, ended its letter. "* * * the service which we have received from your company is the worst of any company from whom we have bought equipment. This applies to all of the equipment which we have purchased through your company, which I shall not take the trouble to enumerate at this time." (Exhibit 105.)

The die situation on the Raimann machines was also causing plaintiffs a great deal of difficulty with their customers (Exhibits 109, 113, 154, 162 and 182). Other exhibits indicate that the partners were wasting time, loafing in the office, and not devoting enough time and effort to sales (Exhibit 124). They were deliberately not pushing sales (Exhibits 180 and 200).

In addition to these personal factors, there were many other factors over which plaintiffs had no control. For example, plaintiffs' own exhibit (Exhibit 59) showed that the plywood industry has had considerable cyclical fluctuations throughout the period covered by the graph (1950-1955). The evidence also showed that there were price breaks, some of which corresponded with production breaks. This was particularly true in November and December, 1951, and November, 1952.

Plaintiffs in letters to the Raimann Company and another manufacturer of equipment as well as to a member of the Prentice family, written in

1952, called attention to the correlation between price and the production of plywood and the demand for equipment. In fact, this was the basis upon which plaintiffs requested the Raimann Company to delay shipping patchers and for the later cancellation of orders (Exhibits 149 and 150. See also Exhibits 101 and 153.). However, at the trial, the writers of such letters stated that some of the letters were incorrect and others deliberately false. For example, Thomas Prentice in a letter to Wheeler Osgood Company, dated January 7, 1952 (Exhibit No. 101), stated:

> "The second consideration is the fact that the plywood market hit a slump and these slumps such as we saw in 1949 and 1950 create a conservative attitude among the plywood people with regard to the purchase of new equipment for a period of six months to a year, following the return to normal business."

At the trial Mr. Prentice testified that he was negotiating for the purchase of patent rights on a clipper machine from the Wheeler Osgood Company. In order to hold down the price, he made this false statement at the suggestion of an employee of the Wheeler Osgood Company and this was "part of (the) manipulation."

The testimony concerning the reasons for writing other letters containing false statements were not as plausible as those given for the Wheeler Osgood letter.

Plaintiffs' Exhibits 57 and 58, which contain a comparison of sales and gross profits by first and

last halves of each calendar year from January 1, 1949, to December 31, 1954, are no evidence that the Smith and Tuck letters resulted in a loss of business not only during the last half of 1952, but also during the whole of 1953.

Plaintiffs' Exhibit 75, which contains a record of sales and commissions of plaintiff E. V. Prentice Machinery Co. for the year 1952 by months, is much more revealing. It shows that more that 40 per cent of the total sales and the total commissions for the year were made during the first two months. Since a great portion of these sales were the result of orders written during the year 1951 and prior to the sharp reduction in both price and production of plywood, it confirms the correlation between price and production of plywood on the one hand and the sale of equipment on the other.

In my opinion some of the fluctuations in plaintiffs' business were greater than the fluctuations in the price and production of plywood. This is true because a supplier of machinery for the plywood industry will have greater fluctuations than those of the plywood industry itself because its market is dependent upon a derived demand.

There are many other facts which were developed by the evidence which confirm my finding that neither the Smith and Tuck letter nor the offensive provisions in the leases on the Skoog machine resulted in any loss or damage to the plaintiffs. However, the facts which I have heretofore discussed clearly indicate the insufficiency of evidence adduced by the plaintiffs to show loss or dam-

age and unsatisfactory character of the evidence that was introduced.

Defendant's evidence showed that the reduction in sales and profits which occurred in 1952 and 1953 was caused by factors other than the letter and the offensive lease provisions.

Plaintiffs announced that unless they were granted substantial damages they did not want any. In other words, they are not interested in either a nominal or a small award.

Attorneys for defendant may prepare findings of fact, conclusions of law and a judgment in favor of the defendant in accordance with this opinion.

[Endorsed]: Filed Sept. 29, 1956.

[Title of District Court and Cause.]

MEMORANDUM ON OBJECTIONS TO FINDINGS

Solomon, Judge:

The proposed findings of fact and conclusions of law, heretofore tendered by the defendant, will be signed subject to the following amendments:

1. The findings should recite on Page 1 that defendant admitted liability in violation of the anti-trust laws, and I believe that an appropriate place to insert it is on line 21.

2. Finding XIX, on Page 6, should be amended by inserting on line 14, between the words "which" and "were", the following: "although made in good faith."

3. Conclusion of law IV should be amended by adding at the beginning of the sentence, before the word "None," the following statement: "Although defendant violated the antitrust laws. . . . "

4. Conclusion of law VII should be amended to delete the provision awarding costs and disbursements to the defendant.

Counsel for defendant shall submit corrected findings in accordance with this memorandum.

[Endorsed]: Filed Nov. 14, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial before the undersigned Judge of the above entitled Court on Monday, December 12, 1955. Plaintiffs were represented by J. Pierre Kolisch, Leonard A. Nikoloric and Henry A. Carey, Jr. of their attorneys. Defendant was represented by Raymond T. Heilpern, James C. Dezendorf and James H. Clarke of its attorneys. At the commencement of the trial all parties waived trial of any issue of fact by a jury, and defendant, without waiving its defenses and contentions raised by its motions for summary judgment, for the purposes of this proceeding only and not otherwise, defendant admitted liability in violating the Anti-Trust Laws and waived all defenses relating to the issue of its lia-

bility to plaintiffs expressly reserving for determination in this action the question whether plaintiffs sustained any damage by any act of defendant asserted or assertable in this action. Plaintiffs and the Court accepted defendant's waiver of the issue of liability as tendered, and the trial proceeded for determination of the single issue as to whether plaintiffs sustained any damage by reason of any act of defendant asserted or assertable in this action. Evidence on behalf of all parties was offered and received at the conclusion of which all parties rested. Thereafter arguments of counsel were heard, at the conclusion of which the parties requested the opportunity to file written briefs, which request was allowed. Briefs were thereupon filed, and the Court took the matter under advisement. Due consideration having been given to the matter, the Court on September 29, 1956 handed down a written opinion. Based upon said opinion, and the Court being fully advised, hereby makes and enters the following:

Findings of Fact

I.

Plaintiff E. V. Prentice Machinery Co., (hereinafter called Prentice) is a partnership consisting of four brothers, Charles E., Thomas H., David V., and Edward A. Prentice, all of whom are citizens of the State of Oregon; plaintiff Prentice Machine Works, Inc., is a corporation incorporated under the laws of the State of Oregon, and defendant is a corporation incorporated under the laws of the

State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

Plaintiffs are engaged in the business of selling industrial machinery, including machinery used in the production of plywood and veneer, in interstate commerce.

III.

Defendant manufactures and sells plywood and veneer. It also owns certain automatic veneer patching machines which were at one time patented (hereafter called "Skoog machines") and leases said machines in interstate commerce.

IV.

In 1950 Prentice became an authorized agent to import and sell automatic veneer patching machines (hereafter called "Raimann machines") manufactured in Germany by B. Raimann GMBH of Frieburg and thereafter sold a substantial number of said machines in interstate commerce.

V.

On July 25, 1952, Smith & Tuck, attorneys for defendant, sent letters to 29 of plaintiffs' customers. These letters were in part as follows:

> "It has come to our attention as well as to our client that you are using machinery and processes for patching veneer which infringes said patents. Our client demands that you immediately cease and desist your infringement

of said patents. Furthermore, our client demands an accounting of your profits in this infringement and payment for damages it has suffered because of your unlicensed use of said infringing machinery and processes. We will expect to hear from you in this respect within ten days of the date hereof. Otherwise please be assured that we are authorized to seek legal redress for all continued infringements and will do so promptly.

"We are enclosing a copy of said patents for your reference."

VI.

On August 8, 1952, Prentice commenced a declaratory judgment action in this Court entitled "E. V. Prentice Co., Plaintiff, vs. Associated Plywood Mills, Inc., Defendant," Civil No. 6579, and sought therein to have the Skoog patents owned by defendant declared invalid and not infringed.

VII.

On August 15, 1952, Smith & Tuck, attorneys for defendant, sent additional letters to certain plywood manufacturers which had not answered the letter of July 25, 1952, inquiring whether the alleged infringing activities had ceased.

VIII.

On August 28, 1952, an answer was filed to Prentice's complaint in suit Civil No. 6579 by Smith & Tuck, attorneys for defendant. In said answer, a cross-claim was asserted against Prentice in which

damages were demanded for patent infringement and unfair competition.

IX.

The trial of Civil No. 6579 was commenced before a jury and the Honorable Gus J. Solomon on November 18, 1952, and it was concluded on November 24, 1952, the jury returning a verdict in favor of Prentice. On May 8, 1953, judgment was entered declaring the Skoog patents invalid and awarding Prentice an attorney's fee in the amount of $7,500.00, together with costs.

X.

Plaintiffs have failed to prove that they suffered any injury or damage to their business or property by reason of any act of defendant asserted or assertable in this action.

XI.

The evidence produced by plaintiffs and defendant conclusively establishes that neither plaintiff sustained any damage by reason of any act of defendant asserted or assertable in this action.

XII.

No potential purchaser of a Raimann machine or any other equipment sold by plaintiffs refused or failed to purchase the same by reason of the Skoog machine leases, the Smith & Tuck letter, the resulting litigation or any other activity of defendant asserted or assertable in this action.

XIII.

In no instance did the Skoog machine or any other automatic patcher replace a Raimann machine nor was a Skoog machine or any other patcher ever sold or leased to a customer who was considering or who might have purchased a Raimann machine.

XIV.

Any reduction in the level of plaintiffs' business at any time herein and particularly following July 25, 1952 was not caused by any act of defendant, but the same was caused by other factors for which defendant is not responsible, including the following:

A. Customer dissatisfaction regarding Raimann machines purchased from Prentice, other equipment purchased from plaintiffs and plaintiffs' service and sales policies;

B. Customer dissatisfaction with the cutting dies supplied by Prentice for use with Raimann machines, and the inability of Prentice to supply dies for Raimann machines which would produce a high grade patch;

C. Failure of plaintiffs to promote sales;

D. Plaintiffs' failure to conduct and operate their business in an aggressive and business-like manner; and

E. Fluctuations in the business level of the plywood industry which resulted in a reduced demand for plaintiffs' products.

XV.

Plaintiffs' business depends upon a derived demand and any reduction in the price of plywood is reflected in a reduced level of plywood production, which in turn causes a reduced demand for products sold by plaintiffs and their competitors.

XVI.

The market for plywood equipment reacts to and is increased by an increase in the price of production level of plywood only after a period of six to twelve months.

XVII.

Plywood prices and production decreased sharply before and during the period following July 25, 1952, and this industry fluctuation caused the decline in plaintiffs' business for which they seek to recover damages in this action.

XVIII.

More than forty per cent of plaintiffs' total sales during the year 1952 were made in the first two months of the year, and plaintiffs' sales fell off from the year 1951 volume several months prior to the Smith & Tuck letter of July 25, 1952.

XIX.

The statement or finding made by this Court in the prior action reported at page 184 of 113 F. Supp., that the receipt of the Smith & Tuck letter of July 25, 1952, by Prentice's customers caused great consternation and effectively stopped sales of Raimann machines, as well as other equipment sold

or distributed by Prentice, was incorrect and was based upon representations made by Prentice's attorneys which, although made in good faith, were erroneous.

Based upon the foregoing Findings of Fact and the Court being fully advised, hereby makes and and enters the following:

Conclusions of Law

I.

This Court has jurisdiction of this action based upon diversity of citizenship as between plaintiffs and defendant, and more than the requisite jurisdictional amount is in controversy, and by virtue of 15 USC Sec. 15 (Sec. 4, Act of Congress of October 15, 1914 G. 323, 38 Stat. 731).

II.

The cause of action asserted in this action was not a compulsory counterclaim under Rule 13(a) of the Federal Rules of Civil Procedure, which was required to be asserted in the prior action in this Court brought by E. V. Prentice Co. as plaintiff against the defendant herein, Civil No. 6579 (113 F. Supp. 182).

III.

The cause of action asserted in this action is separate and distinct from the cause of action litigated in the prior action brought in this Court by E. V. Prentice Co. as plaintiff against the defendant herein, Civil No. 6579 (113 F. Supp. 182) including the allowance of attorneys' fees, and plain-

tiffs herein by maintaining this action have not split a single cause of action.

IV.

Although for the purposes of this proceeding only defendant has admitted that it violated the Anti-Trust Laws, none of the acts of defendant caused any injury or damage to the business or property of plaintiffs, and judgment should be entered in favor of defendant.

V.

Plaintiffs have failed to prove that they suffered any injury or damage to their business or property by reason of any act of defendant asserted or assertable in this action.

VI.

The evidence produced by plaintiffs and defendant conclusively establishes that neither plaintiff sustained any damage by reason of any act of defendant asserted or assertable in this action.

VII.

Defendant is entitled to recover a judgment in its favor against the plaintiffs, and each of them, dismissing this action with prejudice.

Dated at Portland, Oregon, this 14th day of November, 1956.

/s/ GUS J. SOLOMON,
District Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 14, 1956.

In the United States District Court
for the District of Oregon

Civil No. 7091

E. V. PRENTICE MACHINERY C., and PRENTICE MACHINERY WORKS, INC.,
Plaintiffs,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Defendant.

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law heretofore entered herein, and the Court being fully advised,

It Is Hereby Ordered, Adjudged and Decreed that defendant be and it hereby is awarded a judgment against plaintiffs herein, and each of them, dismissing this action with prejudice.

Dated at Portland, Oregon, this 14th day of November, 1956.

/s/ GUS J. SOLOMON,
District Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 14, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiffs in the above entitled action hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the judgment of the United States District Court for the District of Oregon entered in the above case on the 14th day of November, 1956.

Dated at Portland, Oregon, this 12th day of December, 1956.

/s/ J. PIERRE KOLISCH,
/s/ MOE M. TONKON,
Attorneys for E. V. Prentice Machinery Co., and Prentice Machinery Works, Inc., Plaintiffs.

Acknowledgment of Service Attached.

[Endorsed]: Filed Dec. 13, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Come now plaintiffs-appellants E. V. Prentice Machinery Co. and Prentice Machinery Works, Inc. and make the following concise statement of points on which they intend to rely for appeal to the United States Court of Appeals for the Ninth Circuit from the judgment in favor of defendant:

1. The Court erred in entering judgment for the defendant.

2. The Court erred in finding that plaintiffs failed to prove that they suffered any injury or damage to their business or property by reason of any act of defendant.

3. The Court erred in finding that the evidence established that plaintiffs did not sustain any damages by reason of any act of defendant.

4. The Court erred in finding that no potential purchaser of equipment from plaintiffs failed to purchase equipment because of any act of defendant.

5. The Court erred in finding that any reduction in plaintiffs' business, particularly following July 25, 1952, was not caused by any act of defendant and was caused by other factors for which defendant was not responsible, including the following:

A. Customer dissatisfaction regarding Raimann machines purchased from Prentice, other equipment purchased from plaintiffs and plaintiffs' service and sales policies;

B. Customer dissatisfaction with the cutting dies supplied by Prentice for use with Raimann machines, and the inability of Prentice to supply dies for Raimann machines which would produce a high grade patch;

C. Failure of plaintiffs to promote sales;

D. Plaintiffs' failure to conduct and operate their business in an aggressive and businesslike manner; and

E. Fluctuations in the business level of the plywood industry which resulted in a reduced demand for plaintiffs' products.

6. The Court erred in finding that plaintiffs' business depends upon a derived demand and any reduction in the price of plywood is reflected in reduced level of plywood production which in turn causes a reduced demand for products sold by plaintiffs and their competitors.

7. The Court erred in holding that the market for plywood equipment reacts to and is increased by an increase in the price and production level of plywood only after a period of six to twelve months.

8. The Court erred in holding that any decrease in plywood prices and production before and during the period following July 25, 1952 caused the decline in plaintiffs' business for which recovery is sought.

9. The Court erred in finding that more than forty per cent of plaintiffs' total sales during the year 1952 were made in the first two months of the year, and plaintiffs' sales fell off from the year 1951 volume several months prior to the Smith & Tuck letter of July 25, 1952.

10. The Court erred in finding that its statement in the prior case between the parties reported at 184 F. Supp. 113 relating to the effect of the Smith & Tuck letter of July 25, 1952 on the sales of plaintiffs' equipment was incorrect.

11. The Court erred in failing to find that the

books, records and statistical studies of plaintiffs' business were the best evidence of injury by defendant to plaintiffs' business and testimony of specific lost sales by plaintiffs was unnecessary.

12. The Court erred in holding that the statistical method of least squares was inapplicable to plaintiffs' business.

13. The Court erred in failing to follow the controlling law on the type of proof necessary to support an award of damages in an antitrust suit, particularly in view of defendant's admission of liability and violation of the antitrust laws.

14. The Court erred in failing to adopt one of the theories supported by pertinent evidence as to the amount of damages suffered by plaintiffs.

15. The Court erred in not finding that, at best, all of defendant's evidence was in mitigation of damages.

16. The Court erred in failing to permit plaintiffs to examine the books of the Coe Manufacturing Company or, in the event the Coe Manufacturing Company refused to permit examination of its books, in not excluding defendant's exhibits 214 and 316.

/s/ J. PIERRE KOLISCH,
/s/ MOE M. TONKON,
Attorneys for Plaintiffs.

Acknowledgment of Service attached.

[Endorsed]: Filed Jan. 16, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Demand for jury trial; Stipulation re amending complaint; stipulation re amending complaint; Second amended answer of defendant, Associated Plywood Mills, Inc.; Order dated March 7, 1955; Opinion dated August 16, 1955; Stipulation and order dated October 4, 1955; Order dated October 7, 1955; Order denying motion for summary judgment; Letter dated April 27, 1956 (not filed); Opinion dated September 29, 1956; Memorandum on objections to findings; Findings of fact and conclusions of law; Judgment; Notice of appeal; Undertaking on appeal; Order extending time to docket appeal; Statement of points on which appellants intend to rely on appeal; Designation of contents of record on appeal; Appellee's designation of additional portions of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7091, in which E. V. Prentice Machinery Co., and Prentice Machinery Works, Inc. are the plaintiffs and appellants and Associated Plywood Mills, Inc. is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of

record on appeal filed by the appellants and appellee, and in accordance with the rules of this court.

I further certify that there is being forwarded under separate cover the reporter's transcript of proceedings in two volumes. The exhibits are being forwarded at a later date by the attorneys for the appellants.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 6th day of March, 1957.

[Seal] R. DE MOTT,
Clerk,
/s/ By THORA LUND,
Deputy.

United States District Court
District of Oregon

No. Civil 7091

E. V. PRENTICE MACHINERY CO.,
Plaintiff,

vs.

ASSOCIATED PLYWOOD MILLS, INC.
Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon
Monday, December 12, 1955, 2:00 p. m.

Before: Honorable Gus J. Solomon, District Judge.

Appearances: Messrs. J. Pierre Kolisch and Leonard A. Nikoloric, Attorneys for Plaintiff. Messrs. James C. Dezendorf and James H. Clarke, of Attorneys for Defendant, Associated Plywood Mills, Inc. Mr. Ray T. Heilpern, of Attorneys for United States Plywood Corporation.

Court Reporter: Mr. Gordon R. Griffiths. [1*]

(In Chambers)

Mr. Kolisch: I would like to get a statement in the record from the defendants concerning this relationship between the U. S. Plywood and the Associated.

Mr. Heilpern: By reason of the purchase by United States Plywood of all their assets of Associated, a previous tax-free organization, United States Plywood Corporation assumed all the liabilities of Associated Plywood Mills, Inc., and would therefore be responsible for any judgment entered in this action.

The Court: And specifically today, did United States Plywood agree to pay any judgment that may have been rendered in this particular case just because of that general statement?

Mr. Heilpern: No.

Mr. Kolisch: Is the Associated Plywood still in existence as a corporation?

Mr. Heilpern: As far as I know.

Mr. Dezendorf: It has filed intent to dissolve

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

but is still in existence [2] because of the pendency of a suit in Seattle and of this suit.

The Court: Mr. Heilpern has already said that any formal judgment entered against Associated would be paid by U. S. Plywood.

Mr. Kolisch: There is a lot of hearsay testimony involved in this case in the form of letters. The defendants have given us two volumes of letters which they propose to put in. Much of that is hearsay; however, since the case is going to be tried to the Court we are not going to make any technical objections as long as there is an understanding that letters which we may want to introduce from Raimann to us or from customers to us will be not objected to on that ground while reserving the objection as to the materiality. I think that some of those letters that you have in there, for instance, letters from me and letters from one of the partners concerning any arrangement with me are purely immaterial and irrelevant, and I will make the objection on that ground, but I would just like to get those hearsay matters straightened out.

Mr. Dezendorf: From our standpoint, we propose to introduce the letters on the cross examination of the Prentice boys, and we do not propose to put anything in that is not relevant and [3] admissible from the standpoint of their testimony.

The Court: In other words, you do not propose to use any hearsay yourself?

Mr. Dezendorf: Not so far as I know.

The Court: What about permitting the plaintiff to use hearsay?

Mr. Dezendorf: Of course, they have not showed me what they want to introduce. You gave me the list.

Mr. Kolisch: Yes, I thought you had copies of those letters.

Mr. Dezendorf: I think we have, and Mr. Clarke was trying to assemble them out. We did not get them until this morning. I left the office at 11:30.

Mr. Kolisch: I sent it to your office at 12:55.

The Court: Do you want to use that at the beginning of the case?

Mr. Kolisch: There are possibly one or two letters we may want to bring in. [4]

The Court: You show it to him at that time.

(Thereupon, the trial of the above entitled cause was continued in open court as follows:)

The Court: I think we should show appearances here; J. Pierre Kolisch and Leonard A. Nikoloric for plaintiff, and James Dezendorf and Ray Heilpern for defendant. Is that all, or is Mr. Clarke coming?

Mr. Dezendorf: James Clarke will be with us.

The Court: James Clarke.

You may proceed, Mr. Kolisch.

Mr. Kolisch: May it please the Court, this promises to be rather an interesting and significant case. The first thing that I think the Court should be aware of is the nature of the business in which the Prentices are engaged. I think the Court knows a good deal about their business from the prior trial; however, that case was limited to one machine which they sold. That was the Raimann machine.

These boys deal in a complete line of plywood machinery. The evidence will [5] show that their father started in 1916 a business called E. V. Prentice under his own name, and he sold a complete line of plywood machinery. These boys went into the business as soon as they got out of grammar school, and they became familiar with the business, and it was the intention that they would all go into this business as soon as they were old enough. Mr. Prentice, Sr., died in 1943, and the business died with him. At that time there was no one to carry on this business and it was dissolved. At the end of the war the boys came out of the service, and they wanted to get into the plywood machinery business again, but they could not so they went into the woods, and they started logging, and finally by 1947 they had enough money to start the business again so they started a partnership, the sales company, E. V. Prentice Company.

I think that this is something that the Court should be aware of and which will be brought out in the testimony, that when these boys started up in this business in 1947 after the war they had predominantly a seller's market in the plywood machinery business. Their competitors in this business had grown rather fat and lazy during the good years in the war when machinery was difficult to obtain, and these boys came out rather lean and hungry, and from a very modest start in 1947 they built their business up so that by 1952— [6] we are using the date of July, 1952, as the critical date and one from which we are measuring damages—they were

doing business there at the rate of over a $100,000.00 a month. They had a complete line of plywood equipment, and one of the machines that they sold was this Raimann machine. It was an important machine, but it did not represent all their sales by any means, perhaps a third of their business.

Business looked so good to them that in March of 1952 they formed their own machinery company. That is the other half, the Prentice Machine Works. This company was in existence and operation for only about three or four months before July, 1952, when the Associated letter came out.

The evidence will show that these men in their businesses were subjected to the usual problems and difficulties and ups and downs which any business has, namely, suppliers, customer problems, and they had their ups and downs, but the testimony and the charts which we will introduce, and the detailed accounting analysis, will show that year in and year out they were substantially increasing their business, and they were building it up at rather a remarkable rate. The testimony will show that sometime prior to July, 1952, Associated had determined that these people should be eliminated as competitors.

The Court: I do not want to know all this. I want to know what [7] they were doing, what their business dropped to, and what you think that the damages were. I do not need this other information. They have already admitted liability in the case.

Mr. Kolisch: Your Honor, we do not want to labor the liability and we merely want you to know

something about the business, the size of the business. In other words, the Raimann machine is only part of the business.

The Court: I pointed out in my opinion that their business stopped as the result of the letter. Let us go on from there. How much business did they do, and what were the causes of the business—I understand the issue is squarely drawn that there was a drop in the market. That is the defendant's contention, and your contention is that the letter was responsible, and the litigation, for the loss in business. What else do you want to tell me as preliminary?

Mr. Kolisch: We shall show that as of July, 1952, and we have a breakdown of an accounting figure, that shows for the first six months of July, 1952, their net p[illegible] was $145,000.00. In the last six months of 195? [illegible]ney lost $9,000.00. This was the first time it ever happened to them in their business. The whole history of this business had been one of increasing [8] every six months.

The Court: Save that for the closing argument.

Mr. Kolisch: The same thing will be shown with respect to the sales company—I mean the machine company. I was talking about the sales company. The same pattern is repeated there, and we have the detailed accounting analysis and statistics. We have the accountants, an outside accountant and a house accountant who is going to give you all the figures. I have asked them to bring their worksheets, and we also have a business consultant whom we retained. This evidence, I think, will show that

there was no other reason for the Prentices to lose their money other than the fact that they had been attacked by Associated.

The Court: Mr. Dezendorf?

Mr. Dezendorf: May it please the Court, in addition to the factual problem which will be presented in the case by the testimony, the Court will have two legal questions to consider, and I have a brief on that which will appear shortly and which will enlighten you on our theory on it.

Briefly, we contend that for two reasons the plaintiffs in this case cannot recover any damages in this case. First [9] we have an unusual situation in the case in that there was a limited and definite potential that the Prentices had in the industry itself, and we believe the law to be that if we did delay their sales that they cannot recover any damages. In the second place, we believe the law to be in a case of this kind that any injury which the plaintiffs claim to their outside business is not recoverable in this action; that they are limited to the loss, if any, of Raimann machine sales and not their general business.

The Court: Do you have authority on that?

Mr. Dezendorf: Yes. Coming over onto the factual side, the evidence that we shall put on will be from the Prentices themselves which will establish that they were having extreme difficulty with the dies that accompanied the Raimann machines commencing in the Fall of 1951, and in December of 1951 there was a definite drop in the plywood market, and many mills went out of business. Orders

for heavy machinery were just nil. In March of 1952 the Prentice brothers themselves cancelled all orders that they then had outstanding with Raimann. In March and April they kept writing to Raimann saying that the market had just completely gone, they did not know when it would come back, they were hopeful but the outlook was very dark.

In addition, at this point another factor entered the picture, which was to become very serious. The Court will [10] probably recall that the main selling point of the machine was that it was capable of being used on A face material.

The Court: On what kind of material?

Mr. Dezendorf: On A face material, A stock, which is the best grade. In May of 1952 only twenty-five percent of the Raimann machines were being used for A face material because the plywood mills' customers had started complaining that they did not want any plywood with Raimann patches on them. By August of 1952 that had gone so far that there was not a single Raimann machine left being used on A face material. The Prentices wrote several letters to Raimann which are as dark as could be, and in one instance they said unless they were able to get back using the machines on A face within sixty days through the use of some new improved die that they felt the business was all gone completely.

Now another factor entered the picture at this point, which was that two other lines that the Prentices were attempting to sell and which are not re-

lated to the Raimann line started in to develop trouble. One was the Jackson lathe with which they had numerous amounts of problems, and the other was a Victor clipper which they themselves manufactured. The file is replete with complaints from the trade with respect to those two machines in addition [11] to the continuing difficulty with the dies on the Raimann machines.

The Court: I do not understand what you mean by the dies on the Raimann machine.

Mr. Dezendorf: The die is the instrument which cuts the hole and also cuts the patch and inserts the patch into the hole.

The Court: What kind of difficulty were they having?

Mr. Dezendorf: The dies were too brittle and would break even after only an hour or two operation. The dies would not cut a hole that was such that the patch which would come in would fit evenly, and they just tried one die after another, one type of metal after another, and nothing was found that was satisfactory until in March of 1953 the so-called Die No. 29 came out which permitted the Raimann machines to, for the first time, again be used for A face material.

Now just see how long that is. It was March of 1953 before they got their die problem licked, and even then that did not solve the problem in the industry because it was months and months thereafter, as a matter of fact over a year thereafter, until they were able to get enough No. 29 dies to use in the industry. Through this period corres-

pondence [12] of the Prentices themselves will show that they were deliberately not pushing the sales of Raimann machines.

The Court: What period?

Mr. Dezendorf: Up through August of 1953, from April of 1952 to August of 1953 and even after that they were not pressing the sales of the Raimann machine because they still were not sure the die No. 29 was the answer to their problem because shortly thereafter problems developed with die No. 29. As late as December of 1953 they were still having trouble with the dies.

In April of 1954 was about the time when they started really selling the Raimann machine. At that point some of the big mills finally became convinced that the No. 29 die was all right and that the Raimann machine was desirable for their use; however, they still had problems in selling, and it was later than that, in May of 1954, when they finally decided that they had to stop selling the machines and start leasing them because that is the only way that they could continue to sell machines was on a lease basis rather than on an outright sale basis.

Our evidence will show, which will be merely the evidence that they themselves wrote as this transaction went along, that any loss that they suffered had nothing to do [13] with the letter or the lawsuit, but it was purely a die problem and the fact that the machines would not make a good A patch which was all the machine was really good for. We believe that you will be convinced, as we are, that not one cent should be awarded to the Prentices in

this case because of the letter and the prior lawsuit.

The Court: Call your witnesses.

Mr. Kolisch: Call Thomas Prentice. [14]

THOMAS H. PRENTICE

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kolisch): Please give us your residence, age, and occupation.

A. My residence is 9015 S. W. 19th Avenue. My age is 37, and my occupation, I am a partner in the E. V. Prentice Company, a sales organization and partnership.

The Court: What do you do?

The Witness: I am a salesman of the organization and part of the administration division of the company.

The Court: Do you handle the books of the company?

The Witness: No sir, no, we do not do any bookkeeping.

The Court: You are acting as sort of a sales manager?

The Witness: No, all of us are salesmen, your Honor. One retains the position of both selling and managing the office. The other three are primarily road men and selling out on the road.

The Court: Is he the Prentice brother that is going to testify again?

Mr. Kolisch: Yes sir.

(Testimony of Thomas H. Prentice.)

The Court: Very well, proceed.

Mr. Kolisch: Q. You mentioned the sales company. How about the plaintiff in this action?

A. The Prentice Machine Company, all of the stock of the [15] Prentice Machine Company is owned by the partners of E. V. Prentice Company.

Q. Who are your partners?

A. The partners are David V. Prentice, Edward A. Prentice, Robert T. Prentice.

Q. Has there been any change in this partnership during the last three years?

A. Yes, there was a change in 1953 on the retirement of Charles E. Prentice who had been a partner in the business from 1947 to 1953, retired because of physical reasons, and immediately prior to his retirement there was the inclusion of Robert T. Prentice in the organization.

Q. What does this partnership do?

A. The partnership sells a complete line of plywood and woodworking machinery.

Q. How long have you been in this business?

A. Since 1947, November, 1947.

Q. I am going to hand you a group of pictures that I would like to have identified as plaintiff's Exhibit 1.

The Court: I think that in the interests of speed we are going to permit each of the attorneys to hand the witness their own exhibits if they so desire. You do not have to. Mr. Hart will do it for you, but you need not do it.

(Group of photographs marked plaintiff's

(Testimony of Thomas H. Prentice.)

Exhibit 1 for identification and presented to the witness.) [16]

Q. (By Mr. Kolisch): Will you refer to this Exhibit 1 and tell us what that exhibit shows?

The Court: Before you do that, where is the list of your exhibits. Do we have a pretrial order here?

Mr. Dezendorf: No, your Honor, we decided that we did not need it. We just put a stipulation in.

The Court: Do you have a list of the exhibits?

Mr. Kolisch: Apparently my secretary did not put it in.

Mr. Dezendorf: We have ours all marked. There will be some later charts that the accountants are preparing. Our basic exhibits are all marked already.

The Court: At noontime give me a list of your exhibits and offer all of them, and we will rule on them at that time so we can save some time.

Q. (By Mr. Kolisch): Will you describe briefly what is in Exhibit 1?

A. That represents the brochures, in some cases pictures, of a partial list of equipment that we sell. Did you want me to list them?

Q. Do you know briefly some of those that you sell, what you sell it for, I mean price?

A. Well, the first photostat here, a log barker, $37,500.00; chain saws, deck saws for $2,450.00; roll press for $35,715.00; block barker for $13,-5[illegible].00; veneer lathes, forty-five——

(Testimony of Thomas H. Prentice.)

Q. (By Mr. Kolisch): I think that is enough, Mr. Prentice. [17] We have got the idea now.

I take it that this is a line of equipment that both the sales company and the machine company have been offering for sale right along?

A. It is.

Q. Tell us briefly, and I do mean briefly, what the history of your partnership is.

A. Well, the partnership started in 1947. When we got out of the service in 1945 my father's business, the one that we had planned on following, the one we had been educated in and served our apprentice training in, had been closed up because of his death in 1943. We came out of the service and went into sawmilling in Southern Washington, raised enough money to get back into the machinery business. In November, 1947, we entered the machinery business. As I said before, there was four brothers at that time, Charlie, David, Edward and myself.

Q. About how much money did you have when you started this business? What did you put into it? A. Oh, we had about $4,000.00.

Q. What was the approximate net worth of this business in the Summer of 1952?

A. It was about two hundred fifty thousand.

Q. What is Prentice Machine Works?

A. Prentice Machine Works is a manufacturing organization [18] that we formed. We organized it in January, February, 1952; actually started up in operation March 1, 1952.

(Testimony of Thomas H. Prentice.)

Q. Why did you establish Prentice Machine Works?

A. Well, we established it because we were growing in the industry, and the game was good. It was ripe for additional investment in ourselves, which we did in order to obtain and develop new equipment or, that is, develop new equipment and to obtain a guaranteed source where we could give quality control for machines and fill out our line. Some machinery we could not obtain on a representative basis in the sales company.

Q. What type of machinery did the machine works manufacture?

A. Oh, the machine works manufactured things like the Victor Block barker which is about a $15,000.00 item, the Victor Clipper which is about a $15,000.00 item, skinner saws and trimmer saws which ran around nine or ten thousand apiece, patch strip lathes for the Raimann patcher, we are just getting into the development, which is equipment which is $20,000.00 or $30,000.00 equipment; jointers, veneer jointers.

Q. How much did you put into this business to start? A. The machine works?

Q. Yes. A. About $15,000.00.

Q. What was its approximate net worth as of July, 1952? [19]

A. July, 1952, it was about $30,000.00.

Q. What is it worth today?

A. About $90,000.00.

(Testimony of Thomas H. Prentice.)

Q. What is the relationship between the machine works and the sales company?

A. Well, the sales company has, sells all of the equipment for the machine works, all of the equipment that the machine works manufactures, all of the plywood machinery that is manufactured.

Q. It is the exclusive sales agency for that?

A. It is the exclusive sales agency; that is right, exclusive sales contract.

Q. Will you briefly explain what the competitive situation was in the plywood machinery business when you entered it?

A. When we entered the partnership?

Q. Do you understand the question?

A. When we entered in 1947?

Q. Yes.

A. Well, there was not too much competition. It was pretty much a matter of order taking. The customers were waiting in line for deliveries. The Office of Price Administration was still sitting on material and things like that, and it was a carry-over from the war years. There was no competition to speak of, no need for the outside selling, anything like that. Customers came to you. [20]

Q. Were there other concerns who were selling plywood machinery?

A. Oh, yes, yes, there were the regular established machinery houses around the country that were selling machinery, they were selling great deal of machinery, and they were competing in re-

(Testimony of Thomas H. Prentice.)

gards to developing named products, things of that nature.

Q. Can you describe briefly the type of sales activities in which you engaged?

A. Why, we had, of course, a good reputation behind us left to us by our father. Many men in the industry knew us, and we knew them, and we did a lot of knocking on doors, a lot of calling, and it took us considerable pioneering there before we were in the plywood end of it, before we were in a position to really obtain the confidence and make them realize we were reliable, we were not in the thing for just a cup of coffee or anything, that we were planning on staying in that all of our lives. We were educated in it. We did sell other equipment along with that at that same time, not particularly plywood equipment, woodworking machinery mostly.

Q. Was it a question of getting confidence in you from the purchasers and your prospects?

A. Yes, that was the main thing. They had to keep seeing us over and over again to develop this confidence and realize, as I said, that we were in business to stay and that we were [21] starting off in something we were going to stick with.

Q. Had you achieved a degree of financial responsibility by 1952?

A. Oh, yes; yes, not only to the degree of financial responsibility but a high degree of association with our customers.

(Testimony of Thomas H. Prentice.)

Q. Will you describe briefly the function of a Raimann machine?

A. Well, the Raimann machine is an automatic veneer patching machine that is used for removing the defects from veneers, sheets of veneers. It automatically cuts the defects, the blemish, pitch pocket or knot or something like that, cuts the defects out, and inserts a clean patch in its place.

Q. What is the importance of such a machine in the plywood business?

A. Well, the importance of that machine is tremendous because the more we go into the logging areas that are available to industry now the more they are finding the timber of a much lower grade quality than it was before, and in order to make out in their sales of the high grade plywood from a low grade log a patcher increases its importance because it is the key unit or the key machine in providing the high grade plywood from the low grade veneer of the low grade log.

Q. When did you first become interested in the Raimann machine?

A. In June, 1950, at the Forest Products Research Society [22] show which was held in our Armory here in Portland.

Q. Did you see a demonstration of the machine there?

A. Yes, we saw a demonstration of the machine.

Q. What did you do then?

A. Well, when we saw the demonstration of the machine we were very interested in the machine.

(Testimony of Thomas H. Prentice.)

It looked to us like the answer to a lot of discussion we had had with customers up and down the industry and in our selling up until that time. It was a remarkable machine, and we thought it would make a good machine for us to sell and probably to take in a good part of our business, the representative part of our business.

Q. Did you get the distributorship for this machine?

A. Yes, we obtained a distributorship. We approached a representative of the machine at the show and told him we were interested, and after some negotiations with him, well, we came to the conclusion that if we could sell three machines in three months' time we could get the distributorship. We sold the three machines and got the distributorship.

Q. That machine was manufactured in Germany by the B. Raimann Company?

A. By the B. Raimann Company.

Q. You had the exclusive distributorship for what area?

A. For the West Coast of the United States and Canada west of the Rocky Mountains. [23]

Q. Will you tell us briefly what your sales experience was with this machine between the period 1950 to July, 1952?

A. Our sales experience we had was very, very good. It was a machine that had a logical place in the industry, and the experience was very good with it.

(Testimony of Thomas H. Prentice.)

Q. I am going to show you a group of letters from prospective customers marked Exhibits 2 through 13. I think defendants already have copies of these, but I will have a list telling which ones they are.

The Court: Is there any objection?

Mr. Dezendorf: We have some objection to the admissibility of them. As I told the Court in chambers, we just got this list this morning, and Mr. Clarke is engaged in getting the letters out. I have not had a chance to read them. They are in a large part hearsay, and I think a lot of them are before July of 1952. As a matter of fact, most of them are so that I do not see what there purpose is.

The Court: Are they prejudicial?

Mr. Dezendorf: I frankly do not know. I have not had a chance to reread them.

Mr. Kolisch: Let me help to refresh your recollection, Mr. Dezendorf. These are letters which are marked in deposition exhibits which you took of the plaintiffs.

The Court: Are they admissible? [24]

Mr. Kolisch: Probably not. They are hearsay, but, as I explained to your Honor in chambers, I think that there is a good argument that can be made for their admissibility on the ground that they prove not the truth of what they may say but the fact of the impact on the industry of the machine.

The Court: People liked the Raimann machine at that time.

Mr. Kolisch: Yes, those letters show that.

(Testimony of Thomas H. Prentice.)

The Court: They're admitted.

(Photostatic copies of group of letters above referred to marked Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 for identification, and received in evidence.)

Mr. Kolisch: I also want to offer the booklet of pictures, Exhibit 1.

The Court: It is admitted also.

(The booklet referred to, having been previously marked plaintiff's Exhibit 1 for identification, was received in evidence.)

The Court: Mr. Kolisch, I think you ought to start to get down to trying the issues we are going to try.

Q. (By Mr. Kolisch): Did you experience any difficulties in the installation and operation of the Raimann machines?

A. Well, yes, we experienced difficulties, certainly. You do that with any machine. [25]

The Court: When?

Mr. Kolisch: When? The Judge asked you a question.

The Witness: When? We experienced some difficulties when we first started selling the machines because as the servicing people were not entirely familiar with it, there was a certain amount of trial and error we had to go through. We experienced later than that but in lesser degrees, lesser degrees on the whole on the overall picture, matters more serious in some particular points.

Q. Did you have complaints before July, 1952?

(Testimony of Thomas H. Prentice.)

A. Oh, yes, we had complaints.

Q. What was the nature of those complaints?

A. The nature of the complaints were mainly towards the dies. The die situation is a little peculiar in the industry. The maintenance men in the plywood plants did not know how to maintain the dies. They didn't know how to set the dies. These dies have extremely close tolerances, you might say no clearance whatsoever, and, for example, some of our customers with expensive pieces of equipment, some of them would put a die in a machine and would not set it just exactly right and start the machine without hand-working to make sure it would fit, and they were breaking a set of dies like that.

Q. Had you ever had machinery like this Raimann machine before? [26]

A. No, the closest thing was a peeler where there was a knife involved, but it was not a die where one knife fits inside another knife and with real close tolerance.

Q. I take it from what you've said that this trouble you had had right from the start with the Raimann machine?

A. Yes, we had some die trouble at the beginning. We still occasionally have die trouble until we educate the operator how to use it.

Q. Did you sell the machine despite these troubles?

A. Yes, we sold them despite those troubles. There wasn't anything major about those troubles.

(Testimony of Thom . H. Prentice.)

Q. People wanted them despite this trouble?

A. Certainly.

Q. Did anybody ever junk the machines?

A. No one. Every machine we have ever sold is in operation today.

Q. You say that your sales experience with Raimann was good. What do you mean by that? How were you selling these machines? Give me an idea at what rate you were selling these machines.

A. The machines were selling on a steadily improving basis. This is high priced equipment. You do not sell it every day. Sometimes you go months and you do not sell them. Then you sell a bunch of them. You have ups and downs in the business, but it gets better all the time. Things got better with us all the time. [27]

The Court: Do you have a list of monthly sales, during 1950 to 1951?

Mr. Kolisch: Yes, your Honor.

The Court: Wouldn't that be the best evidence?

Mr. Kolisch: I get to that in more detail later.

Q. Did you ever have a period where—prior to July of 1952—where you felt a resistance or a difficulty in selling this machine?

A. Yes, we did just prior to July, 1952, we did. This resistance was developed, I don't know, it was just a coolness towards the machine. There was some talk at that time about it that we heard from different circles about the possibility of our getting in dutch with the Skoog machine. I mean at the

(Testimony of Thomas H. Prentice.)

time Associated had the word out on us that we were getting ready for a fall.

Mr. Dezendorf: I move that that be stricken as not responsive and as hearsay.

Mr. Kolisch: I do not think it is hearsay. I think the witness is qualified to testify as to that. He was out in the industry.

The Court: In the first place, the testimony is stricken. In the second place, if you are going to date the fall of business to anything that Associated did prior to the date upon which the letter went out, you have to bring the witnesses into Court. [28]

Mr. Kolisch: As I understand it, on July 25, 1952, Associated sent out letters to your customers?

A. That is right.

Q. What happened after that?

A. We just stopped doing business.

Q. What do you mean, you stopped? Just explain your statement a little more.

A. Well, we tried to do business but our "water was shut off" is about what it amounted to. The customers received letters on Monday, the 28th. We opened up our offices down there, and as soon as we opened them up we were just deluged by calls from all of them saying that they had received letters from Associated's attorneys accusing them of infringement in using a patching machine. They assumed it was the Raimann machine, and they were all demanding that we defend them against anything that might occur as a result of those letters.

(Testimony of Thomas H. Prentice.)

Mr. Kolisch: I offer, your Honor, plaintiff's Exhibits 15 through 39 which are letters from plaintiff's customers and from plaintiffs back to customers subsequent to July 25, 1952.

The Court: Is there any objection?

Mr. Dezendorf: No.

The Court: They are admitted. [29]

(Photostatic copies of group of letters above referred to, marked plaintiff's Exhibits 15 through 39, inclusive, and received in evidence.)

Q. (By Mr. Kolisch): This group of letters which we have just admitted, will you just look through them briefly? Are they photostatic copies of letters which you received and which you sent?

A. These are photostatic copies of letters from our files, yes. I have looked through them already.

Q. What happened after this July 28th Monday morning telephone call that you testified about? What happened after that in your business?

A. Well, our business dropped off. We were under a cloud in the sale of this machinery. It is high priced equipment, and you've got to have a lot of customer confidence when you sell it to him because he has got to, as I said before, none of it goes trouble free. He has got to have somebody reliable backing it up. We found that this confidence was gone in our customers. They were wondering if we could even survive this attack that was aimed at us, and they said as much, and we doubled our efforts to sell. Our business was floun-

(Testimony of Thomas H. Prentice.)

dering, and we had families to take care of, things like that, and we had to continue doing business.

Q. What did you personally do trying to make sales? [30]

A. Personally I, as I say, redoubled my efforts, traveled my territory and called on my customers.

Q. What was your territory?

A. Throughout Washington and British Columbia.

Q. How many mills were you calling on there?

A. In Washington about 35 of them; in British Columbia about 8. The 35 in Washington represented better than a quarter of what the industry was right then.

Q. When you spoke about "we," were you talking about your brothers also?

A. Yes, they were doing the same thing.

Q. Do you know roughly how many potential customers you had for your line of machinery in Washington and British Columbia about July, 1952?

A. That is the general business or the Raimann patchers?

Q. General business.

A. Well, they were all potential customers, every one of them.

Q. Do you have any idea as to the number?

A. I would say about 35 in Washington, about 8 in British Columbia.

Q. Were you trying to sell a complete line of machinery to your customers at all times?

A. Yes, I was; yes, I was.

(Testimony of Thomas H. Prentice.)

Q. What happened to you, and give us an example of your trying to sell your machinery. What response did you meet? [31]

A. Well, one typical example of it is the Northwest Door Company in Tacoma. I had been working with them on the development of a green end.

Q. What is a green end, Mr. Prentice?

A. A green end is the end of the plywood operation with just peeled and clipped veneer to dimension. It is not dry at that time, anything like that. It has become quite prevalent in the industry out here now, green veneer mills feeding the manufacturers of plywood. They can move in close——

Q. Is there a lot of machinery that you sell involved in the green end?

A. Well, yes, there is, and we sell a complete green end.

Q. What does the complete green end cost?

A. The cost come anywhere from one hundred ninety to two hundred thirty thousand dollars.

Q. All right, proceed. You were telling us about Northwest Door.

A. Yes, at Northwest Door I had been working with them on this program, arrangement for a green end, and went up there and called on them. It was about a week or two following the letters there of July 25th, and I went in to see Russ. Walters who I had always called on, the General Manager of the operation, and when I got in there and asked for him, instead of going into his office I was

(Testimony of Thomas H. Prentice.)

ushered into a conference room and instead of seeing Russ. Walters, Russ. came in and so did [32] Jim MacDougall, Miles Munson and a man by the name of Fred from the door plant. I don't recall his name right now, and Mr. Peterson, the Office Manager, and they all wanted to know what we were doing about the trial, how we were going to protect them, what they were going to do about Raimann equipment, and things of that nature. They were so busy asking me about the attack and everything like that that I couldn't get a chance to sell them, and that continued everytime that I went up there. I couldn't get to them any more about the sale of this machinery.

Q. Did you have the same experience at other places? A. Yes, yes.

Q. How about the business of Prentice Machine Works, what was the effect on its business as a result of the Associated letters?

A. Well, the Prentice Machine Works was the same thing only compounded quite a bit because in the case of the Machine Works' customers where we were not only the salesmen, we were the manufacturers, and they were looking—they would have to look to someone to back this machinery up, if not the salesmen at least the manufacturer. In the case of the Machine Works we were both. They just couldn't—they had lost their confidence in us as salesmen, and losing their confidence in us as salesmen they also of course lost confidence in us as manufacturers. [33] They just didn't think we

(Testimony of Thomas H. Prentice.)

would pull out of it, and they were not about to deal with someone that was on his way out.

Q. After the latter part of 1952, that is, after the Associated letters, how many Raimann machines were you able to sell during the period July to December, 1952, in your territory.

A. None; none at all.

Q. Did your company sell any of them?

A. We didn't actually sell them. We concluded the delivery of one in Washington, one that had been deferred because of the attack, yes. The order had been taken before July 25th, and the customer refused to take it until after the trial, until after the patent matter was cleared up, and then, of course, only after I would give him a certain protection or an agreement to protect him.

Q. This suit, this patent suit was terminated in the end of November, 1952? A. Yes.

Q. What did you do after the termination of this patent suit? Did you notify your customers?

A. Yes, we did, we wrote them letters advising them that we had won out in the patent matter, that our machine was not infringing any patents. We also advised them, I believe, that the Skoog patents were void.

Q. Have you been able to do business with these people since [34] that date? A. Yes.

Q. By that I mean at the end of November?

A. End of November, yes, following November, yes, we gradually got back to a position where we

(Testimony of Thomas H. Prentice.)

could talk to them again and start to rebuild their confidence in us.

Q. Did you then actually make sales subsequent to November of 1952 to people who had refused to buy from you before?

A. Yes, yes, we made sales.

Q. Did you actually lose any sales then?

A. Well, certainly, we lost sales.

Q. If you made the same sales how did you lose them?

A. Well, everyone knows business begets business. The machinery that we could have sold between July, I mean right after July or around July of 1952, after that the machinery that we could have sold then would have brought in additional business for us. It is common knowledge that when you are in a position or when you sell anything it always encourages the customer to deal with you on other problems of his, which encourages more machinery sales. There was also this other thing about loss of sales at that particular time. Some of this machinery in the plywood industry has a pretty long life expectancy to it, and the customers that purchase machinery during that period of that long life expectancy, you see, we don't even get another chance at them until that machine [35] comes up for replacement, and that might be twenty or thirty years hence.

The Court: What kind of machinery are you talking about?

The Witness: Well, some things like lathes.

(Testimony of Thomas H. Prentice.)

There are lathes operating in the industry today that have a fifty-year life expectancy.

The Court: I think the question is directed to the Raimann machines; is it not?

Mr. Kolisch: I asked you with respect to the Raimann machine.

The Witness: With respect to the Raimann machine?

Q. That is right.

A. Well, the same thing, there were some that, as I said before, some that probably would have—there are many that they would have bought.

The Court: What machines did they buy during that period?

The Witness: They didn't buy anything to speak of, your Honor. It was just—we didn't have any relationship with them.

The Court: I mean, what did those customers buy?

The Witness: In place of the Raimann machine?

The Court: Yes.

The Witness: They didn't buy anything, that is, that I know of, that I am aware of.

Q. (By Mr. Kolisch): Was there any limit on the market of, let us say, a Raimann machine as of July, 1952? What [36] was the potential of that machine? A. In July, 1952?

Q. Yes.

A. The potential was, I would say, tremendous. It was unlimited as far as we could figure.

(Testimony of Thomas H. Prentice.)

Q. What is the potential of that machine related to, if anything?

A. It is related to the production of plywood and also your deterioration of logging. I mean, logs we are getting in today that are putting out poorer and poorer veneers.

Q. Under what arrangement was the Raimann Company manufacturing machines for you in July of 1952? A. What was the question again?

Mr. Kolisch: Please read the question.

(Last question read.)

The Witness: Do you mean the business arrangement?

Q. That is right.

A. We were buying them from them—by July, 1952, we were buying them and reselling them to our customers here in the States.

Q. Were they producing machines for you, manfacturing them at any given rate?

A. Oh, yes, they were manufacturing them in a series of ten. Well, it would take them six weeks to manufacture a series of ten. [37]

Q. What sort of deliveries were you getting on these machines?

A. Well, were getting about, well, we were getting five a month.

Q. How long did it take you to satisfy a customer's order as of July, 1952, for a machine?

A. I think in July, 1952, we were quoting about four or five-months delivery.

Q. Were you experiencing any difficulty in July,

(Testimony of Thomas H. Prentice.)

1952, in getting Raimann machines from the factory? A. No, none whatsoever.

Q. Did you ever cancel any orders for Raimann machines from the factory? A. Yes, we did.

Q. When?

A. We cancelled the remainder of a blanket order in 1952.

Q. Prior to July, 1952?

A. Yes, prior to July, 1952. I think it was around March or April, somewhere in there.

Q. You mentioned blanket order. What was this blanket order?

A. When we took on the position with Raimann of buying machines directly from them and reselling them, in order to encourage them and assure them that they had made a proper move in getting us this appointment we gave them a blanket order for a hundred machines. Now, in 1952, in the early [38] part of 1952 just after we concluded the matter on the machine works and got the machine works going we started to pay more serious attention to the relationship of ourselves with Raimann and were just going along fine. Business was increasing, and we could see ourselves in an unfavorable position with this large order at the factory. There were certain improvements and suggestions we wanted to make on the machine, and we didn't feel that we could do it as long as they were sitting there with a larger order in their hip pocket. They would not be of a mind to go along with us on the items that we wanted to change so we cancelled that

(Testimony of Thomas H. Prentice.)

particular remainder of that order in order to go into a more positive plan in which we could order as required as we could see our requirements coming up. It was just getting away from kind of a blank-check deal and going into a positive business-like approach.

Q. At any time prior to 1952 did you ever experience difficulty in getting Raimanns from the German company?

A. Immediately prior to, well, prior to it, yes, in 1951, we had a little trouble getting machines. They were having a little trouble with shortages over there, recovering from the war years and things, and we had a little trouble then, but we didn't have—I mean that cleaned up. They stepped up production. They added on a second die maker, and then we began getting less problems in 1951, the early part of 1952 we [39] were getting deliveries just as we required them.

Q. As of July, 1952, could you have gotten, if you had had the orders, say, at least five machines per month on an average?

A. Oh, yes, we could have gotten five machines.

Q. What is the monthly average of Raimann machines that you have received from the factory during 1955? A. Twelve——

Mr. Dezendorf: Just a moment. I will object to that. I think there are some figures on that; are there not, Mr. Kolisch?

Mr. Kolisch: Yes, there is a chart on that. I will withdraw the question.

(Testimony of Thomas H. Prentice.)

The Court: I might assume that Raimann would increase its size of factory if they could sell machines. I wanted to know what the market was at that time. That is the thing I have been trying to find out all the time. We are are getting far afield with all this salesmen's talk. I want to see the figures. I want to see what the index figures of the business were during that period.

Mr. Kolisch: We shall provide those, your Honor. We have those figures. I am trying to give a picture of this business and what he ran into when he was trying to sell this machinery. We have that information.

Q. If you had had orders for machinery, and I mean your [40] whole line of machinery, not only Raimann's, subsequent to July, 1952, could you have gotten the machinery? A. Yes, we could have.

Q. If your business in the sale of plywood machinery, including the Raimann machine, had increased subsequent to July of 1952 in the manner in which you indicated it would have had you not been interfered with, would your cost of business or your overhead have changed any?

A. No, no, it wouldn't. It costs us so much to go down and open the door every day whether we do a whole lot of business or a little business. It wouldn't—there would not have been any material increase in overhead at all.

Q. Supposing your business had doubled or tripled, would you have gotten some more office help? A. No—in July of 1952?

(Testimony of Thomas H. Prentice.)

Q. Yes.

A. No, no, we had a full office staff; had had it for some time prior to July, 1952. We would not have had to hire any additional help at all.

Q. Were you ready, able, and willing as of July, 1952, to sell your complete line of plywood machinery? A. Yes, we were; yes, we were.

Q. What is the average life of the Raimann machine? Do you have any idea?

A. The average life, we figure, is five to six years. [41]

Q. In connection with the Raimann machine business, did you have a spare-parts business?

A. Yes, we did. Every time we sold a Raimann machine we sold some spare parts at the time of the sale and sold additional spare parts. Our spare-parts business ran about $450 a machine a year. That is about the production of it right now.

Q. What happened to this business as a result of Associated's activities?

A. Well, that was affected, too. It fell off considerably.

Mr. Kolisch: Your witness.

The Court: Are you not going to tell us the facts? I have been asking for these facts, and I do not get them.

Mr. Kolisch: Your Honor, what is it that you want to know?

The Court: Let us see the letters of cancellation and these various other things. What are the business index figures?

(Testimony of Thomas H. Prentice.)

Mr. Kolisch: The letters of cancellation, of course, Mr. Dezendorf had, and they will be put in. The index figures, of course, we will have to put in through our accountants and business consultants, your Honor.

The Court: Proceed.

Mr. Kolisch: I cannot put it in with this witness. He does not know anything about that. [42]

Cross Examination

Q. (By Mr. Dezendorf): Mr. Prentice, what was the die that you were selling with the Raimann machines that were sold in the fall of 1951? What was the number?

A. Well, there were several types of dies sold with the machines.

Q. What were the numbers?

A. They were number 8's, number 7's, number 8's, and number 19's.

Q. That is the fall of 1951? A. Yes.

Q. Were you having any trouble——

A. Excuse me, there was a number 5 also, and there was an experimental number 3, a number 2.

Q. Those were in the fall of 1951?

A. Those were in the fall of 1951; that's right.

Q. Where you having any trouble with those?

A. What kind of trouble do you mean? Well, I explained a little while ago we were having trouble with dies, yes, insofar as the maintenance men were not educated to set them into the machine and to sharpen them.

(Testimony of Thomas H. Prentice.)

Q. That is your conclusion. What happened to the dies? What was the ultimate result? They broke, didn't they? A. No.

Q. They did not? [43]

A. Some broke; some didn't. Some of those dies we sold in the fall of 1951 are still in operation today manufacturing A-grade plywood.

Q. And have all the time?

A. Have all the time.

Q. Are you sure of that? A. Yes, I am.

Q. Will you name one mill that was making A face in September of 1952, one mill?

A. September, 1952?

Q. Right.

A. Martin Brothers Box Company, Coos Bay Plywood, Buffelen Manufacturing, the fall of 1952. I don't know, there were more. You want me to go through the whole list? I should refer to a list.

Q. I am putting you to the test. I want you to give the best answer you can give. I will show you some letters that your brother wrote that contradict you 100 per cent.

The Court: We are going to have argument at the end of the case. Let us ask the witness questions.

The Witness: There were more than that. There were more than that.

Mr. Kolisch: May I give the witness a list of the Raimann patchers and users? Perhaps this will help his recollection. [44]

The Court: Go ahead.

(Testimony of Thomas H. Prentice.)

(Document presented to the witness.)

The Witness: Anacortes Veneer, fall of 1952.

Q. (By Mr. Dezendorf): September, 1952.

The Court: On all those customers of yours, were they accounts that you personally handled?

The Witness: I was associated with them, your Honor, in that I would talk to them on the phone or meet them when they came into the office, discuss these things. Every user that I know at the time was either using it for A or preparing to use it for A or was making arrangements for it. I think Coquille Plywood was in on that, too. Let me see.

The Court: That is enough, go ahead.

Q. (By Mr. Dezendorf): Mr. Prentice, was there any break in the price of plywood in late 1951 and early 1952?

Mr. Kolisch: There are charts on that. I object to asking this witness questions——

Mr. Dezendorf: I am laying a foundation for the letters that this gentleman wrote.

The Court: Objection overruled.

The Witness: You are asking me a question that I do not know for sure. I don't follow the price of plywood in the machinery business. I mean, the price of plywood is not a matter of importance with me. I get rumors about the [45] fact that the price is going down or going up, but what it is I don't know. I couldn't say for sure whether there was a price break at that time.

Q. Is it your statement that you were unaware

(Testimony of Thomas H. Prentice.)

of a break in the price of plywood in late 1951 and early 1952?

A. Late 1951—I think there was a fluctuation of the price during that time. What it was and when it was I don't know because I don't keep up with the price.

Q. Did you at the time know about it.

A. Oh, at the time I undoubtedly knew about it, and it would have been just conversation around the office or around the people I was talking to or customers.

Q. Isn't it a fact that whenever there is a serious break in the plywood market that that makes impossible the sale of heavy plywood machinery for at least a year after the market comes back up?

A. Absolutely not. We do most of our selling in the low plywood price part of it. People are then interested in any means that will save them money.

Q. I am showing you now Defendant's Exhibit 1, Mr. Prentice, which purports to be a letter that you wrote on January 7, 1952, to Mr. Henry Gonyea of the Wheeler-Osgood Company. Do you remember writing that letter? A. Yes, I do.

Q. Do you have it well in mind? [46]

A. Yes, I do.

Q. Did you make this statement in the first paragraph on the second page of that letter:

"The second consideration is the fact that the plywood market hit a slump, and these slumps such

(Testimony of Thomas H. Prentice.)

as we saw in 1949 and 1950 create a conservative attitude among the plywood people with regard to the purchase of new equipment for a period of six months to a year, following a return to normal business." A. Yes.

Q. You said that? A. Yes, sir.

Q. That was a true statement; was it not?

A. No, not in the sense that you are talking about here. I was trying to force these people—I mean I was not trying to force them, I was negotiating with these people to buy their interests in a clipper, buy their patent rights in the clipper for the machine works. In attempting to do that I was doing everything that I could to indicate to them that the possibility of continued sales at this time was not to be expected. Now, I was advised to follow this course by Mr. MacArthur who was the assistant to Mr. Gonyea. He said that he himself was personally anxious to sell this patent assembly or this patent arrangement to us on the [47] clipper but that he thought Mr. Gonyea had a feeling that the clipper business might come back up again, and he suggested to me that I write along these lines, which I did, and I consider this as a part of manipulation, if you call it that, to convince Mr. Gonyea that there would be no market for a while. I was trying to hold him down to a price that we could afford to pay for that patent, and I accomplished in that effort a holding down partially, not as far down as I wanted to, but partially.

Q. In other words, your statement now is that

(Testimony of Thomas H. Prentice.)

the statement that I read you was untrue, and you knew it to be untrue at the time you wrote it?

Mr. Kolisch: That is not what he said.

The Witness: No, this is true as to the particular case I am talking about. This applies to a particular situation between Mr. Gonyea and myself, but as to the industry as a whole, no, that didn't apply.

Q. (By Mr. Dezendorf): Read it.

(Presenting document.)

The Court: I know what it says. You do not have to pursue this any further.

Q. (By Mr. Dezendorf): Who was it in your organization that cancelled the Raimann orders that you had in Raimann's hands in March, 1952?

A. I believe it was Dave. [48]

Q. You did not do it yourself?

A. I don't believe I did, no.

Q. That was done by letter; was it not?

A. It could have been either. It could have been either Dave or it could have been the office man that we had in there at the time who used to do a lot of correspondence along that line.

Q. That letter of cancellation was dated March 24, 1952; was it not?

A. Do you have a copy of it that I might see to verify that?

Q. I am just asking you if that was not about right as to the time of the letter cancelling the orders?

A. That would be, it would be around that general time, yes.

(Testimony of Thomas H. Prentice.)

Q. You know, as a matter of fact, don't you, Mr. Prentice, that after that letter of March 24, 1952, you did not have a single order for a machine in Raimann's hands?

A. We did not have a single order in there?

Q. That is right.

A. Well, we knew that there was a carry-over of those orders, and when we cancelled the 36 there was still some machinery in transit.

Q. In transit, yes.

A. As I recall from dates, there were to be some that were to be shipped in April. They were going to clean up what [49] they had, and we were considering this fact, that we were still going to get another series beyond this cancellation, too.

Q. But your cancellation said, "Do not ship any beyond April 17th or until we order some more," didn't it? A. That is right.

Q. You did not order any more, did you?

A. No, we didn't order any more.

Q. You had no order outstanding on July 2 and 3, 1952, did you, in Raimann's hands?

A. You mean with Raimann?

Q. That is right.

A. Well, I would not be sure about that.

Q. You know that you did not, dón't you?

A. I would like to see the report. No, I don't, I don't know that.

Q. Mr. Prentice, did you know that in April of 1952 only 25 per cent of the machines that you had sold were being used to produce A-face material,

(Testimony of Thomas H. Prentice.)

and the rest, the other 75 per cent were being used to produce B grade?

A. You say do I know that?

Q. That is correct.

A. Well, I tell you, I didn't check out the whole industry, but the people that I talked to in that time, I talked to many that were using it for A. I solicited several of them, [50] and the bulk of them were using it for A, in my recollection, the bulk of them were using it for A. Those that were not using it for A we were busy servicing them on the maintenance of their dies. The only reason why they could not make A on it was just because of the maintenance of the die.

Q. You did not have a die then that would make A grade, did you? A. Sure we did.

Q. What one?

A. The 19, the number 7, the number 8.

Q. Now get back to my question. You say——

Mr. Kolisch: He just answered it.

Q. (By Mr. Dezendorf): Do you say that a statement that only 25 per cent of the machines that Prentice Brothers sold were working on A grade as of April 18, 1952, is true or false?

A. I think that is false. I think there were more than that.

The Court: Did he write the letter?

Mr. Dezendorf: No, one of his brothers did.

Mr. Kolisch: Your Honor, I am perfectly willing to have him examined on what he knows about these letters. Go ahead and examine him on it because I

(Testimony of Thomas H. Prentice.)

do not intend to put all the brothers on. I am perfectly willing to have this witness examined.

Mr. Dezendorf: I cannot understand why he does not put [51] one of the brothers on, the one that wrote these letters, but I am going to cross-examine him about the letters he wrote.

Q. Now, Mr. Prentice, by May 22nd of 1952 was the patcher situation very bright then?

A. Yes, it was.

Q. You did not have a single order in to the factory, did you?

A. As I say, I do not particularly recall whether we did or didn't have, but every customer that I talked to was talking to me about the machine, about the delivery, the price on it, the accomplishments of the other customers, their own use with the machine, everything like that. It was very bright to us.

Q. Directing your attention again to May 22, 1952, by that time this was a fact, Mr. Prentice, that the buyers from the mills had started sending in orders saying, "No Raimann patches." You know that to be a fact, don't you?

A. I have never ever seen any such orders. I have heard about them. I also know that at the same time the Government was requesting that they put Raimann patches in the panels on the A-grade panels.

Q. Let us go back to May 22, 1952. Were you then aware of the fact that this customer resistance

(Testimony of Thomas H. Prentice.)

had built up against your using Raimann patches on plywood?

A. No, there was no customer resistance. Are you talking [52] about our customers?

Q. That is right. A. No.

Q. I am talking about the persons who order from the mills who were telling the mills, "We do not want any plywood with Raimann patches on them."

A. No, there was no build-up of that kind of resistance.

Q. You are sure that never existed?

A. That is right. I couldn't say never existed entirely. It could have existed, yes.

Q. Isn't it a fact, Mr. Prentice, that on August 28, 1952, the last company, the last remaining company that was using your Raimann for A-face material ceased? A. In August of 1952?

Q. August 28, 1952. A. They ceased what?

Q. Using the Raimann on A-face material?

A. No.

Q. That is not true?

A. No, that is absolutely not true.

Q. Isn't it a fact that on August 28, 1952, your organization had reached the conclusion that unless they could get some new dies that you would be out of business on the Raimann machine within sixty days? A. No. [53]

Q. That is not true? A. No.

Q. Do you remember when it was that the num-

(Testimony of Thomas H. Prentice.)

ber 29 die was approved by the Douglas Fir Plywood Association?

A. I don't know whether the Douglas Fir Plywood Association ever approved the number 29 die. They don't approve any die.

Q. All right, let us rephrase the question. Do you know when it was that the Douglas Fir Plywood Association first approved A-face material that was patched with die number 29?

A. In about the early spring or the late winter or early spring of 1953 we put one of these dies in a machine down at Plylock Corporation, and the D.F.P.A. inspectors looked at it and gave their approval on it. They did not approve it. There is no one that can approve these dies for manufacture of A. It has to be accomplished by the job that it does.

Q. Is it a fact, Mr. Prentice, that it was March 9, 1953, when the first plywood cut with the number 29 die was approved for A grade by the Douglas Fir Plywood Association?

The Court: That is not inconsistent with anything that the witness has said. He just said that the Douglas Fir Plywood Association does not approve a die.

Mr. Dezendorf: That is right.

The Court: They only are concerned with the material itself. [54]

Mr. Dezendorf: I am merely trying to establish the date, if the Court please, when this die

(Testimony of Thomas H. Prentice.)

that finally saved their necks came out and was used.

The Court: That is a gratuitous remark which I am not going to place any credence in. Do you know when the first sheet of plywood was approved with the number 29 die?

The Witness: It would have been down at Plylock. The inspectors were in on it about March, 1953, but I think there is a mistake here, your Honor.

The Court: Go ahead, what mistake is there?

The Witness: Well, the Douglas Fir Plywood Association does not approve the dies by any particular series. They do not come to us and say, "All right, your number 29 dies are approved; therefore, anyone using them is O.K."

The Court: I understood that.

The Witness: It is just the material that it develops.

Q. (By Mr. Dezendorf): How many cycles a minute would the Raimann machines that were sold up through June of 1953 make? A. 27 cycles.

Q. When was it that the new machine came out that would do 40 cycles?

A. It was the latter part of 1953, the last, somewhere in the last half of 1953.

Q. What kind of a clutch did the original Raimann machine [55] that you started selling have on it in 1951? A. Mechanical clutch.

Q. What? A. Mechanical clutch.

(Testimony of Thomas H. Prentice.)

Q. When if ever was that mechanical clutch replaced?

A. It was replaced in the fall of 1951 with a hydraulic clutch.

Q. The hydraulic clutch turned out to be a dud, didn't it?

A. Oh, no, they are still operating today, over 70 in operation today.

Q. Isn't it a fact that most machines that you got from the factory with a hydraulic clutch you had the hydraulic clutch taken off and a mechanical one put back on? A. Oh, no; no, sir.

Q. Did that ever happen?

A. That the hydraulic clutch was taken off and a mechanical one put back on?

Q. That is right.

A. It has happened, yes. It happened just about two months ago.

Q. It happened at the time they came out with it, too, didn't it?

A. No, there were two different varieties of hydraulic clutches. Now there was one that we assembled and mounted on the machine here in Portland. There was another one that [56] came over from the factory, normally things that came over from the factory. We assembled the one we put in in Portland because it had a little bit more versatility to it, and it was adjusted a little more to the operators here.

(Testimony of Thomas H. Prentice.)

The Court: When was that hydraulic clutch put on by the factory, what month?

The Witness: We started putting them on out here and checked them and after they were—worked all right, then we started—then we prevailed on them to put it out. I think they finally came out with their first one somewhere the fall of 1951 or the winter-spring situation of 1952. It would have taken that long to get back and get processed through.

Q. (By Mr. Dezendorf): Mr. Prentice, getting back to the market situation for plywood and for machinery in July of 1952, do you say that there was a good market at that time for plywood machinery? A. July, 1952?

Q. Right. A. Yes, sir.

Q. Is there any doubt in your mind about that?

A. No, sir.

Q. Showing you Exhibit 3 and especially the large paragraph on the second page, are you familiar with that, or would you like to read it over again before I question you about it? [57]

A. I think I had better read it over. I see that this has been omitted here, but is that the one you are referring to, the one that has lines on it?

Q. Yes, that is the one.

Mr. Kolisch: Which letter?

Mr. Dezendorf: July 22, 1952, Exhibit Number 3, from Thomas Prentice to Veneer Machines Divi-

(Testimony of Thomas H. Prentice.)

sion, Jackson Industries, Inc. In there it is Section 5-D, Exhibit 9.

The Witness: Yes, all right, I have got it.

Q. (By Mr. Dezendorf): Did you make the statement in that letter, Mr. Prentice, that in your estimation this gentleman, a Mr. Fandt who was considering going into the plywood business was hitting the market at the wrong time for "there is quite a saturated condition out here in Douglas Fir plywood"?

A. I made that statement, but it is an error in the way you made it. That had to do with Douglas Fir veneer and the veneer market, and the plywood market I qualified that down below: "—has suddenly cooled considerably on his desire for fir veneer operation."

Q. You say now, I take it, that the veneer market had saturated but not the plywood market in July, 1952; is that correct?

A. The veneer market was coming to a saturated condition, yes.

Q. But not the plywood?

A. No, not the plywood market.

The Court: Were the Raimann machines available on a veneer?

The Witness: They are not a machine used in the veneer end of it, no.

The Court: Did you sell any equipment for the veneer industry?

The Witness: Oh, yes.

(Testimony of Thomas H. Prentice.)

The Court: Or were you solely, just in plywood?

The Witness: No, complete veneer plants. We sold many complete veneer plants.

The Court: You called on 35 plants in Washington and 8 in British Columbia?

The Witness: Yes, your Honor.

The Court: In July, 1952, how many of those mills had Raimann machines?

The Witness: I would have to check back to that list, if I may. That shows—now, did you just want a rough estimate?

The Court: A rough estimate.

The Witness: Oh, a rough estimate, I would say about, well, more than half.

The Court: More than half had Raimann machines?

The Witness: I would say more than half, yes. [59]

The Court: So you had out of 43 plants at least 21 of them that had Raimann machines in 1952?

The Witness: You are including the Canadian deal. Yes, I think that is right.

The Court: What about those other companies? Did you business stop with the other companies as well after July, 1952?

The Witness: Oh, yes, we were dealing with them with other equipment even though they didn't have Raimann machines, yes.

The Court: Did you find it difficult to sell these other companies other types of equipment?

(Testimony of Thomas H. Prentice.)

The Witness: Oh, yes, their confidence in us had gone, your Honor, and we couldn't really sell them anything.

The Court: Even though those companies did not have Raimann machines?

The Witness: Even though they did not have Raimann machines. They were burying the dead before the corpse got cold; that is what it amounted to, the way they felt about it, anyway.

Q. (By Mr. Dezendorf): Mr. Prentice, are you familiar with the profits and the sales that your company made in the second quarter of 1952, which would be April, May, and June of 1952?

A. I did not hear that.

Q. Mr. Prentice, do you have in mind the [60] sales which your companies made in the second quarter of 1952, which would be April, May, and June?

A. Well, I wouldn't know what those sales were. I mean I would not have any idea of the dates and amounts of anything like that, no.

Q. Isn't it a fact, Mr. Prentice, that your sales for the second quarter of 1952 fell off considerably from the first-quarter sales of 1952?

A. I don't know, we don't reckon things down there by quarters. They have their high and their low spots, yes, all of our machinery sales have that. They have high spots and low spots.

Q. Let us get back to the precise question. Do you know that the second quarter of 1952 of your

(Testimony of Thomas H. Prentice.)

business was much worse than the first quarter of 1952?

A. Well, I was probably aware of it at the time because it is a part of my job to be aware of those things. Right now I can't particularly go back and say that I do recall, but it fell off in that period. It was undoubtedly down a little bit. We had been experiencing resistance out there in selling, yes, and it was probably down at that time in the second quarter.

The Court: We will recess until 2:00 o'clock.

(Noon recess taken.) [61]

Afternoon Session, 2:00 p.m., Trial Resumed

The Court: Do you want to call another witness instead of Mr. Prentice?

Mr. Kolisch: I would like to interrupt Mr. Prentice. I have one witness here who has to be in the hospital tomorrow morning.

The Court: Is there any objection?

Mr. Dezendorf: None.

Mr. Kolisch: Call Mr. John B. Power. [62]

JOHN B. POWER

a witness produced in behalf of the plaintiff, having been first dully sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kolisch): Will you please state your residence, age, and occupation, Mr. Power?

A. My residence is 312 Edwards Lane, Van-

(Testimony of John B. Power.)

couver, Washington. I am 66 years old, and I am ungainfully employed.

The Court: You are what?

The Witness: I am ungainfully employed, your Honor.

The Court: I thought you were in the Vancouver Plywood the last time you were here.

The Witness: I retired from there April 15, 1954.

Q. (By Mr. Kolisch): Do you have any present connection with the plywood industry, Mr. Power?

A. Only as a director of M. & M. Woodworking Company.

Q. How long have you been connected with the plywood industry? A. Since July 1, 1935.

Q. What was your first connection?

A. With Vancouver Plywood and Veneer Company.

Q. As what?

A. I became general manager.

Q. You remained general manager until you retired, Mr. Power? [63]

A. Until I retired April 15th of 1954.

Q. Later I may ask you some questions which will call for information and opinion relating to the plywood-manufacturing business and also to plywood-manufacturing machinery. Would you please tell us what experience, knowledge, or other information you have which would qualify you to give us information concerning these matters?

The Court: Is there any question as to whether

(Testimony of John B. Power.)

Mr. Power is a man well acquainted with the plywood industry?

Mr. Dezendorf: We concede that.

The Court: Proceed.

Mr. Kolisch: Thank you.

Q. During the period between 1950 and 1954 did you keep abreast generally with what was going on in the plywood industry?

A. I think I kept fairly well abreast.

Q. During that period did you also keep abreast of plywood-manufacturing machinery?

A. I did that at all times.

Q. Are you familiar with the Raimann patching machine? A. I am.

Q. When did you first become familiar with it?

A. Prior to World War II, I believe, in probably 1939. I won't be sure of that date. It could have been a little earlier, but I don't recall exactly.

Q. Did you buy any machinery from the plaintiff, Prentice Brothers? A. Yes.

Q. What kind of machinery have you bought from them, and give me any approximate dates that you can recall.

A. I bought two clippers from them. I bought a core lathe, then after that a core clipper to go behind that lathe, and I bought—up until the time I left the industry I bought three Raimann clippers——

Q. Patchers?

A. Raimann clippers—I mean patchers, thank

(Testimony of John B. Power.)

you, and a tenoner. Well, if there is anything else I have forgotten it.

Q. The machinery that you bought from the Prentices, was it satisfactory or unsatisfactory?

A. It was satisfactory.

Q. Did you have any troubles with any of this machinery? A. Surely.

Q. Did you ever have trouble with other machinery that you bought? A. Surely.

Q. Were the difficulties or troubles that you had with the Raimann or the other Prentice equipment that you bought any different from that of any other manufacturer or supplier?

A. No, they all have bugs. [65]

Q. Did the Prentices stand behind the machinery they sold to you? A. Yes.

Q. What was the reputation in the industry at the time that you were actively engaged as manager of Vancouver Plywood of the Prentices as far as their equipment and their servicing of their customers?

A. Well, my acquaintanceship with the Prentices goes back beyond these boys that are now here to their father whom I knew well and bought equipment from. I believe that at all times the entire family has been considered number one for integrity and willingness to stand behind their obligations.

Q. What is your opinion of the Raimann machine as a piece of equipment?

(Testimony of John B. Power.)

A. Well, I bought three of them.

Q. Do you know what other plywood-mill operators' opinion was of the Raimann machine during the period 1950 to 1954? A. I think I do.

Q. What was it? A. It was favorable.

Q. Did you hear any criticism of the Raimann machinery? A. Yes.

Q. Did you hear any more criticism of the Raimann machinery than you did of other machinery?

A. Not a bit. [66]

Q. Are you familiar with grading in plywood manufacture? A. Yes.

Q. Could you explain to us what that is?

A. I don't know whether I can or not. I can try.

Q. Please do.

A. When plywood was first introduced in a quantity basis — well, let's say from 1935—the grades referred to panel itself, a plywood panel, and we had "good one side" and "good two sides," and so on. Later, I believe it was in 1947, we adopted veneer grades, and they became part of the fair-practice standards published at the Washington Association. Then we came to the A, B, C, and D grades of veneer. Now, those grades, of course, followed into the panels, but it was an attempt to make possible the grading of production as it came from the log so that it could be handled in the mill. Then later we applied it to the panel so that the result was a double A or an AB or AC or AD and

(Testimony of John B. Power.)

so on. I don't know whether that explains it or not, Mr. Kolisch.

Q. I think that gives us some knowledge of what this means, and I would like you to tell us, if you can, what relation the Raimann machine has with the grading of plywood.

A. Since I have been acquainted with the industry, 25 years, there has been an increasing demand for equipment or methods to improve the quality of veneer, to upgrade the veneer. The veneer itself has gone downgrade, and there has [67] been an attempt to utilize a more versatile product. There has been a necessity for more repairs so that the industry has always been, I would say, alert to get anything that they can to help repair veneer and repairs panels. The demand, in other words, for a patching machine has always been intense.

Q. Now, with respect to the use of a Raimann machine to produce A-grade veneer, or is it plywood?

A. Well, it is both, but the machine was not intended to patch plywood. It was intended for veneer only.

Q. Is the Raimann machine——?

A. May I explain to you?

Q. Yes, please do.

A. You referred to a machine that patches a panel as a panel-patcher. You refer to the ordinary patching machine as a machine that patches veneers only.

(Testimony of John B. Power.)

Q. Is the Raimann machine only usable for producing A-face grade?

A. Oh, no, no, I would say it is less useful for that.

Q. What is its major use?

A. Its major use is in the low grades.

Q. During the period of July, 1950, to July, 1952, what was the acceptance of the Raimann machine in the plywood industry?

A. I believe it was very generally acceptable. I do not think that everybody had them by any means. I think I [68] bought our first one in 1951. That is the one I was able to receive delivery of. I got it in 1951, I believe, and it was a satisfactory machine.

Q. Do you know of anything that happened at any time during the period 1950 to 1954 which affected the market for machinery sold by the Prentices? A. Well, surely I do.

Q. What was that?

A. That was the—it is hard to know the word to use, but the effort made.

The Court: That was the lawsuit?

The Witness: Yes, that was the lawsuit.

The Court: Proceed.

The Witness: Yes, that was the effort made to stop it.

Q. (By Mr. Kolisch): I presume you have in mind the letter which Associated's attorneys sent to users of Raimann machines?

(Testimony of John B. Power.)

A. I got a copy of it.

Q. You got a copy of it? A. I did.

Q. What was the effect of that letter on you?

A. It didn't have any effect on me, sir.

Q. Why not?

A. Because I knew about the machine. I knew in my own mind, I was convinced I was not under any jeopardy, and I proposed to use it. [69]

Q. Why not?

A. Because I had negotiated for, and had completed all of the details of buying the machine in Germany before the war, and I knew the principle, the whole theory of the thing.

Q. Supposing you had not known about that——?

The Court: Let us talk about the facts, Mr. Power, as a result of that letter, did you stop doing business with the Prentices?

The Witness: No.

The Court: Did you regard them as less reliable after you received the letter than before you received the letter?

The Witness: Not me.

The Court: You bought everything you would have bought anyway even though you received the letter?

The Witness: I didn't buy any—yes, I believe I didn't buy a patcher. I bought a core lathe and the clipper.

(Testimony of John B. Power.)

The Court: You are friends of the Prentices; are you not?

The Witness: Sure.

The Court: You testified on their behalf at the last trial?

The Witness: That is right.

Mr. Kolisch: Q. If you had not had this information——

The Court: I think that is clearly inadmissible, clearly inadmissible. [70]

Mr. Kolisch: Your Honor, this witness has knowledge concerning the general operation of the trade and what other people—he was circulating in the industry, and I think that this witness is qualified to testify concerning what the industrial or the business reaction was.

The Court: Why don't you bring in the people whom you claim were prejudiced by it?

Mr. Kolisch: Obviously, your Honor, we cannot do that with this defendant. After all, we are representing the manufacturers; they represent the trade.

The Court: That is the worst kind of hearsay you are trying to bring in now.

Mr. Kolisch: Q. In your opinion, would the termination of the patent infringement suit favorable to Prentice at the end of November, 1952, have caused machinery buyers to start buying machinery from the Prentices right after that action had been terminated? A. No.

Q. Do you know of anything that happened in

(Testimony of John B. Power.)

the plywood industry during the period from the beginning of 1952 until the end of 1952 — I will strike that question. What were the business conditions in the plywood manufacturing business during the period 1950 to the end of 1952?

Mr. Dezendorf: From 1950 to '52?

Mr. Kolisch: Yes, sir. [71]

The Witness: Well, the plywood industry has always been an up-and-down industry as far as sales and production is concerned, but the trend for those three years was definitely up.

The Court: How about the first six months of 1952 as opposed to the last six months of 1952?

The Witness: I think you will find, and I have to rely on my memory—I have not tried to refresh it—I think you will find that the sales curve was probably down in October and November and then started right on up and probably carried until February a little higher, then sunk, then rose again.

The Court: What are you talking about?

The Witness: I am talking about the sales curve of the industry.

The Court: Of what year?

The Witness: 1952. That was the question, wasn't it?

The Court: Yes, what about January and February of 1952; was it good or bad?

The Witness: I believe that the sales were up, trended up.

The Court: How about March, April, May, and June?

(Testimony of John B. Power.)

The Witness: I believe they were down. I believe they trended down.

The Court: Then when did they start getting good again? [72]

The Witness: Probably about — now, your Honor, I am guessing at this, only my recollection, but I would say in the fall.

The Court: Do you know how much business you did by the month with Prentice?

The Witness: No, not offhand. With Prentice, oh, I wasn't doing business by the month with them at all.

The Court: You would only buy occasionally?

The Witness: I was just buying occasionally, yes.

The Court: Didn't you buy their full line?

The Witness: No.

The Court: You just bought a Raimann machine?

The Witness: Well, you recall the clippers and the core lathe and the tenoner.

Mr. Kolisch: Q. During the period, say, from the middle of 1952 until the end of 1952 or into 1953 the plywood industry continued to buy machinery. A. Yes.

Q. Was there any change?

A. Mr. Kolisch, the plywood industry, as far as its management is concerned, I think, pays scant regard to the immediate situation. They are looking down the road. They have got to plan for things to come. As far as I am concerned, I was more apt to

(Testimony of John B. Power.)

divert any spare time I had to the acquisition of more timber or to the study and analysis of the equipment [73] than I was to what the immediate condition was in the plywood industry. We always had an order file for Vancouver.

The Court: You had a what always?

The Witness: We always had an order file. We always had a market.

Mr. Kolisch: Q. Was there any time during the period, let us say from 1951 to the middle of 1952, when this situation as far as buying plywood machinery changed materially?

A. You mean in the industry?

Q. Yes, sir.

A. I don't believe that I am qualified to answer that. To my knowledge, it didn't.

Q. Do you have any opinion as to what the potential sale of plywood machinery, a complete line like that sold by the Prentices, was from the period beginning the beginning of 1952 up until today?

A. That has been an increasing potential all that time. I don't know how many plants have been added to the industry since 1952, but there has been a lot of them. I suppose 50, and every one of those is a potential buyer for the equipment that the Prentice boys have to sell.

Q. Would that apply to the Raimann machine as well as to the other machinery?

A. Oh, surely, surely.

Q. In your opinion, an efficiently-run plywood-manufacturing [74] mill supplying a sizable jobber

(Testimony of John B. Power.)

order file could use how many Raimann patchers if it were producing 3,000,000 feet per month? Did you get that question?

A. Yes, I think I got the question. Now, as to getting the right answer, a plant with an ordinary order file and an inferior quality of logs would require more machines than a plant with good logs and an average jobber inventory, let us say. My own experience in operating a plywood plant leads me to think that three Raimann patchers would represent 3,000,000 feet of production.

Q. What is your opinion as to the effect of the Smith and Tuck letter to the Raimann users and the subsequent lawsuit in the industry as far as the Prentices were concerned?

Mr. Dezendorf: I would object to that for the reasons and upon the ground that it is incompetent, irrelevant, and immaterial to any issue to the case. In addition, it merely asks this man for hearsay evidence, which is not proper.

Mr. Kolisch: This is not hearsay, your Honor.

The Court: You are asking him what he thinks.

Mr. Kolisch: What was the impact on the industry, his opinion. He knows something about the industry. It is worth whatever it is worth to you.

The Court: It is not worth very much, but I am going to let him answer that.

Mr. Kolisch: Q. What is it? [75]

A. Why, they quit buying.

Q. I beg your pardon, sir?

A. They quit buying Raimann machines.

(Testimony of John B. Power.)

Q. How about their other line of machinery?

A. I don't know so much about that, but I don't believe that anybody bought any Prentice equipment.

Mr. Kolisch: That is all. You may examine.

Cross Examination

Q. (By Mr. Dezendorf): Mr. Power, isn't it a fact that there was a rather severe break in the price of plywood in December of 1951?

A. I cannot answer that with definite knowledge. I would have to refer to the graph on the thing, but the general trend of the thing would lead me to think that there probably was because almost every year there has been.

Q. Isn't it a fact that a very considerable number of the small, newer mills went under in the first six months of 1952? A. I didn't know of it.

Q. You did not know? A. No.

Q. Isn't it a fact, Mr. Power, that the sales of heavy machinery used in the plywood industry went down quarter by quarter in the year 1952? In other words, they were at X dollars in the first quarter of 1952; they were less in the second quarter; they were even less in the third quarter; and [76] even less in the fourth quarter of 1952?

A. Are you speaking of actual sales or——?

Q. Actual sales of heavy machinery used in the plywood industry.

A. Other than the—well, now, I am trying to get a right answer for you, Mr. Dezendorf. You got to

(Testimony of John B. Power.)

consider the fact that all of the equipment that the Prentice boys sold was off——

Q. I am not talking about Prentice; I am talking about all of them, all of the suppliers.

A. All right, all combined it might be, but I don't know. There must be available figures on that to show actually what happened.

Q. If the figures do show that, would that mean anything to you? A. Yes, yes.

Q. Isn't it a fact, Mr. Power, that whenever there is a severe drop in the price in the plywood market that it is six months to a year after things get normal before heavy machinery is bought again?

A. I don't know whether that is true or not. Myself, as I have testified, and I believe it is true for the industry, for the management of the industry, that they are looking ahead without regard of the immediate price of plywood because plywood historically has been up and down. [77]

Q. Mr. Power, did you have occasion to, or did you receive Marple's Business Roundup published in Seattle, Washington, and specifically the issue of November 5, 1952? A. I didn't have it.

Q. You have never had that available to you?

A. No, well, it might have been available, but I never had it.

Q. And you did not read it? A. No.

Q. You therefore would not know whether you agreed or disagreed with what its contents were?

(Testimony of John B. Power.)

A. That is right, I don't know who Mr. Marple is.

Q. Isn't it a fact, Mr. Power, that one of the main selling arguments in favor of the Raimann veneer-patching machine was that it would make patches on A-face material? A. No.

Q. That is not true?

A. No, not so far as I know.

Q. Did you use it for A-face material?

A. No.

Q. Never did?

A. In 1953 we began to use it. In late 1953, that is when I ordered the last machine that I ordered, which was, I think, in February.

Q. Before that you did not try to use it on A-face material? [78]

A. No, I used it all for core. As a matter of fact, Mr. Dezendorf, the Raimann people brought out a particular type of die which made it particularly applicable to the use on core. When I say "core," understand this, that you are always attempting to upgrade your veneer. You understand what I mean?

Mr. Dezendorf: Oh, yes.

A. All right, that is the attempt so that if you can take a piece of D and make a piece of C out of it without putting too much work on it, that is your attempt. It was this core machine, that is all I used it for.

Q. Well, then, would this be a fair statement, that so far as you and Vancouver were concerned,

(Testimony of John B. Power.)

you never did try to use it for A face until 1953?

A. That is right.

Q. Isn't it a fact, Mr. Power, that many of the other mills tried to use it for A face right from the start?

A. Well, I don't know whether they told me that they did, but that is hearsay.

Q. And they didn't have good luck with it either, did they?

A. They didn't tell me about that.

Q. You do not know about that?

A. I know that there was question about it because it was discussed in the industry.

Q. As a matter of fact, they didn't come out with a die [79] that would really work until the second quarter of 1953, for A face, did they?

A. Well, not to my knowledge.

Q. Mr. Power, you, as you have already said, have known the Prentices for many years, and, as a matter of fact, the boys come to you and ask you for advice and counsel all the time, don't they?

A. No, I am sorry, that is not true.

Q. They do on occasions?

A. Well, they have not as frequently as they might have. Perhaps I could have given some good advice in the past three or four years.

Q. However, at times you have been very critical of them, haven't you? A. Of them?

Q. Yes. A. Or of their machinery?

Q. Of them. A. No, I think not.

Q. Mr. Power, let me ask you this, if this state-

(Testimony of John B. Power.)

ment which appears in Defendant's Exhibit Number 180 which is a letter written by David Prentice to Robert Prentice is correct or not, dated June 19, 1952: "Mr. Power has been raising hell with me every day with regard to the long delay in getting the thing erected." [80]

A. Getting the thing what?

Q. Erected. A. What was it referring to?

Q. It was referring to a Proctor dryer.

A. Yes, undoubtedly that is true.

Q. You were very critical of them over a long delay in the installation of that dryer; were you not?

A. I don't think that I was, but I probably directed my criticism to the wrong fellow.

Q. Well, then, this statement is not correct that I just read you?

A. Yes, I am sure it is. Let us get it all clear, Mr. Dezendorf. The Proctor dryer actually was purchased through Prentice from Proctor, and it was an absolutely new machine, and they had some trouble at the factory getting the stuff ready.

Mr. Dezendorf: That is all.

The Court: Mr. Power, is there a correlation between the price of plywood and the production of plywood?

The Witness: Yes.

The Court: The higher the price the greater the production?

The Witness: The higher the price the more they try to make; you bet you.

(Testimony of John B. Power.)

The Court: Isn't there a correlation between production [81] of plywood and the amount of purchases of machinery and equipment?

The Witness: Well, I think this, your Honor, at least this was the thing that governed me and I think all good management, if I could include myself with that, the effort all the time was to reduce the cost of production so that when the price was low I could buy a machine that would cut the cost I bought the machine. Looking down the road, I knew I could pay for it. In fact, I never bought it unless I had the money in my pocket, anyway, so that I was looking to reduce the cost.

The Court: Would you say that the position of the Vancouver Plywood was typical in the industry, that all these plywood companies always had enough money in their pocket to pay for equipment regardless of the market?

The Witness: I wouldn't say all of them. All of them that had any background experience were well financed, yes.

The Court: There were a lot of companies in pretty bad shape at that time; were there not?

The Witness: Not that I know of. There may have been--you mean plywood companies?

The Court: Yes.

The Witness: I don't know if any had not weathered the storm. They might have been in bad shape. They don't tell you those things, you know. No, the plywood industry [82] has gone along, I

(Testimony of John B. Power.)

think, rather outstandingly, amazingly, almost too good for itself.

The Court: The veneer-patching machine, that was used on what type of product mainly?

The Witness: Well, it may not have been used on the B or the C or the D which are three lower grades. Now, the average mill with the average supply of logs won't produce over, well, let's say between 25 and 30 per cent of its recovery in natural A-grade veneer, stuff that the graders will take off first. Now, the next cut below that is B. If by the insertion of a little repair up to the economy point you can raise the grade of B to A, you have increased your sales price, you see, because double A or the AB plywood sells for more so the effort is always to bring up the grade of your veneer. Does that make it clear?

The Court: Yes, it does. As I understand it, you did not stop buying from the Prentices because of the lawsuit and the letter, but you think that the other companies did?

The Witness: Oh, I know they did.

The Court: You know they did?

The Witness: I know they did, sure.

The Court: On all commodities or mainly on the Raimann machine?

The Witness: No, they were afraid of Raimann. They were afraid of the letter. I don't blame them who would not [83] buy. That was a rather stunning letter to pick up.

The Court: How about, for instance, on the Vic-

(Testimony of John B. Power.)

tor clipper and the Jackson lathes; do you think that had anything to do with it?

The Witness: Yes, I think it did. I think it did. I think just as a layman standing by——

The Court: That is just one of those——

The Witness: That is just one of those things, "Well, they are in trouble. I guess I will not buy it." That is just one of those natural things.

The Court: You think that the other people were more careful than you were?

The Witness: Well, they didn't have the background of knowledge. That was one thing. I knew about this Raimann deal.

Mr. Kolisch: Your Honor, just one question. I am not sure that your Honor understands.

Q. What was the specific knowledge that you had that did not make you afraid or apprehensive of Associated——?

A. Mr. Kolisch, I told you I had bought a machine, that is, I had negotiated the sale.

The Court: I know all the correspondence. I have read the correspondence.

The Witness: I am sure that your Honor does, so that is what I knew about it. [84]

Mr. Kolisch: Q. You knew that this Raimann machine had existed before the United States patent to Skoog? A. That is right.

The Court: Of course, that does not make any difference. You are not a patent lawyer, are you, Mr. Power?

The Witness: No.

Mr. Kolisch: Thank you, Mr. Power.

Mr. Dezendorf: That is all.

(Witness excused.) [85]

THOMAS H. PRENTICE

recalled, testified as follows:

Cross Examination—(Continued)

Q. (By Mr. Dezendorf): Now we are back to you, Mr. Prentice. Mr. Prentice, is it your assertion in this case that you and your brothers were actively pushing and promoting the sale of the Raimann patcher from June, we will say, of 1952 right on straight through?

A. Yes, we were actively doing so, and, as I said before, we had even redoubled our efforts after July. You mentioned from June. It was——

Q. Was there any time after July, 1952, when your company advised the trade not to buy Raimann veneer patchers?

A. Was there any time which we advised them not to buy?

Q. Right.

A. Certainly not. We were selling them.

Q. There was no time, to your knowledge, when you advised the trade to wait until a new die came out or until a new machine or a new improvement came out?

A. No, sir. That was—excuse me, to clarify that, that was to our customers? Is that what you are referring to?

Q. Yes.

(Testimony of Thomas H. Prentice.)

A. It was to our customers. To our suppliers it was a different story.

Q. To your customers?

A. Yes, to our customers. [86]

Q. Mr. Prentice, your company had complaints concerning every single Raimann machine that you sold, didn't they?

A. No, not every single Raimann machine we sold, no.

Q. You did not? A. No.

Q. Didn't you have trouble with all of them?

A. No, we would have trouble with the majority, litle odds and ends of features of adjustment and things like that. Now you mentioned complaints. When I think of a complaint I think of a customer complaint to us. Now some customer could call up and say, "I think that the machine has gone out of adjustment. Will you please send a service man up." We would send a service man out, and it would possibly be out of adjustment. The service man would call automatically without his calling, but some would write letters and say, "This is what is happening." They would call our attention to it by form of letter. Now we did not have complaints with all of our machines. Many of our machines worked fine, beautiful.

Q. You say you had complaints with respect to the majority of them?

A. Are you talking now about the machine itself or a complaint of the machine or its function and operation?

(Testimony of Thomas H. Prentice.)

Q. It did not work right, did it, as it was supposed to?

A. Oh, ~~no,~~ we never had any complaint about the fact that the machine wouldn't do what it was supposed to. [87]

Q. Did you ever have any trouble with bearings, any at all? A. Yes, we did.

Q. You had a lot of trouble with them, didn't you?

A. No, we did not. We had a little spot of trouble at one time.

Q. Did you ever have any trouble with bearings in the fans?

A. Those were the bearings involved.

Q. Did you ever have any trouble with the clutch not disengaging completely that the teeth of the gears——?

A. Yes, if the gears would come out of adjustment it would certainly not engage, and we would give advice. I mean they would call for advice or an explanation to correct it.

Q. Did you ever have any trouble with the springs not standing up?

A. We have had occasional trouble with springs not standing up, yes.

Q. As a matter of fact, you had so much trouble with them that you finally had the springs made here, didn't you?

A. No, having springs made here was a matter of expedience for our own stock. It was just a little

(Testimony of Thomas H. Prentice.)

difficult to clear springs through Customs when they could be built right here in Portland.

Q. Let us talk about 1951. Were there any improvements made on the Raimann machine at your suggestion after 1951? [88]

A. By the factory?

Q. Right. A. Yes, there were.

Q. There were a lot of improvements made at your suggestion, weren't there?

A. That was our obligation to the manufacturer, was to find — I mean, determine what was needed in the machine and to recommend a change this way or that way to accommodate the trade, yes.

Q. And in order to eliminate the objections that the trade raised to the machine before the corrections were made; isn't that right?

A. No, the trade was not raising objections to the machine. An individual operator of a machine would object to a certain feature of the machine, and we would either adjust it ourselves, or if it looked like it would be advantageous to the industry to receive the adjustment we would recommend to the factory that they make the adjustment a standard revision of the machine.

Q. Let us talk about equipment other than the Raimann patcher. Did you ever have any difficulties or complaints from customers with respect to other equipment that you sold?

A. We have had customer complaints on all equipment we have sold. It is impossible to make a machine a hundred per cent perfect. You are bound

(Testimony of Thomas H. Prentice.)

to get a complaint from a customer on [89] any machine.

Q. You have had some pretty scathing complaints from the trade, haven't you, with respect to machinery other than Raimann?

A. We have had some scathing and some mild, yes.

Q. I am showing you now—by the way, I should interject. At the clerk's suggestion we have renumbered all our exhibits starting at 100 instead of at 1 to eliminate possible confusion with the plaintiff's exhibits so when I said earlier referring to 1, 2, 3, 4, those will now be 101, 102, 103, 104, and I ask now that Exhibit 102 be handed to the witness.

Mr. Nikoloric: What is the old number?

Mr. Dezendorf: That is 5-C, Exhibit 2.

The Court: I think we are getting a little far afield here. The witness has said they had trouble with all types of equipment. I think the evidence is only relevant if you want to prove that the Prentices' reputation in the industry was bad and that they were not selling good equipment. Is that what you want to do?

Mr. Dezendorf: No, we are trying to show that there were reasons other than the lawsuit for their drop in business in 1952, and it was very strong complaints from the trade concerning not only the Raimann machine but the other equipment which they were producing, and this letter addresses itself to a machine that they designed and themselves produced. [90]

(Testimony of Thomas H. Prentice.)

The Court: In other words, it is your contention that during the year 1952 they were selling equipment of various kinds that had serious defects in them?

Mr. Dezendorf: That is correct.

The Court: And until those defects had been remedied they were not doing business with that type of equipment?

Mr. Dezendorf: We have letters here. As a matter of fact, the next one to come up is one where they said they would never have anything further to do ever with the Prentice Company because of the machines that they supplied and the service they provided for them.

Mr. Nikoloric: Your Honor, I know that this type of cross examination is probably technically correct. Mr. Dezendorf has produced two books of letters, all kinds of letters. I do not see any reason why this one letter that Mr. Kolisch is a little worried about because it had to do with some fee arrangement with him was not correct, but other than that we have no objections to putting them all in. It seems to me it is taking an awful lot of time asking this witness to explain a lot of letters. We do not even ask that he explain them. We do not think that they are damaging.

The Court: Go ahead. These are impeaching letters.

Mr. Nikoloric: Yes.

The Court: Question of credibility of the witness.

(Testimony of Thomas H. Prentice.)

Mr. Nikoloric: What he is doing, he is showing him the [91] letters and letting him explain them away.

The Court: The witness has already stated in connection with one letter that he falsified. Now he has the right to go ahead and show that he has falsified in others, if he can do it.

Mr. Nikoloric: That is all right. I think your Honor's phraseology is a little strong. He did not say falsified.

Mr. Dezendorf: Q. Do you have before you Exhibit 102? A. Yes.

Q. Did you yourself receive that letter from Roseburg Lumber Company?

A. Yes, I did.

Q. That is a pretty strong letter of complaint with respect to the machine that your company itself manufactures; is it not? A. It is that.

Mr. Dezendorf: We will offer it in evidence.

A. I might add that since this letter this same customer has purchased three of these same machines.

Q. With the same defects that showed on this one?

A. The same machine. There were some defects in that machine. That machine was not manufactured by us, incidentally, to give a little history. It was manufactured by a subcontractor here in Portland.

Q. Put out under your name?

A. And we went down immediately after receipt

(Testimony of Thomas H. Prentice.)

of that letter [92] and made the adjustment to the man that was necessary, at our own expense, and since then he has purchased more.

The Court: The exhibit is admitted. As I understand it, there is no objection to the admission of all of these exhibits with the exception of one written to Mr. Kolisch, and all of those with the exception of the one to which objection has been made are admitted. The letter to which an objection is made is not admitted at this time.

Mr. Dezendorf: I had better hand up then the ones that have been referred to earlier. 101 and 103 are the ones that were shown to the witness before the adjournment. Now I ask that Exhibit 105 be handed to the witness.

(Document handed to the witness.)

Q. Is that a letter you received from Mt. Baker Plywood, Inc.? A. Yes, it is.

Q. It is dated December 31, 1952; is it not?

A. That is correct.

Q. Does the second paragraph of that letter read as follows:

"May I state this, that the tone of your letter was such as to definitely antagonize our entire personnel, a fact which I regret. As I pointed out to you on one previous occasion, it was my thought that the public relations of your company were the lousiest of any company doing the type of business you do of which I have ever heard. [93] In looking over our records I find we have bought over $72,000 worth of equipment from your company in the

(Testimony of Thomas H. Prentice.)

past year. I shall frankly state it is my opinion that we have purchased the last piece of equipment from your company."

Does it read so?

A. It reads so.

The Court: It is in evidence now, and I can read it myself, Mr. Dezendorf. You do not have to read it for me. If you want to impeach the witness with any document you have, that is perfectly all right with me, but I do not think it is necessary that you read these various self-serving declarations.

Mr. Dezendorf: Well, then, I will offer 106 which is the witness' reply.

The Court: They are all admitted already. All of those have been admitted with the exception of one letter concerning Mr. Kolisch.

Mr. Dezendorf: I will ask that 107 be handed the witness.

The Court: Before we go any further, give me a list, a full list of your exhibits.

Mr. Dezendorf: We have the original here. There are 113. Do you wish a list in addition to the letters? They are all marked. [94]

Mr. Kolisch: This list is in abbreviated form. I am having a full list made out which shows what the exhibits are. I am having my secretary put them in a more detailed condition.

The Court: Have you seen a list of the plaintiff's exhibits?

Mr. Dezendorf: I have.

(Testimony of Thomas H. Prentice.)

The Court: Does plaintiff offer all of the exhibits?

Mr. Kolisch: Plaintiff does.

The Court: 1 to 61, inclusive?

Mr. Dezendorf: I have not yet had an opportunity to see all the exhibits. I have seen the list.

The Court: Take a look and indicate the ones to which you desire to interpose objection. All others will be admitted. Have you seen the list of defendant's exhibits?

Mr. Kolisch: We received these two booklets, and Mr. Nikoloric is familiar with them, and he has said as far as he is concerned it is only this one letter.

Mr. Nikoloric: As a matter of fact, I do not even object, your Honor, as to the one letter. Mr. Kolisch is upset because they have a fee arrangement in this letter. He does not like to have that in the letter. If they are willing to admit that the fee arrangement is incorrectly stated in this letter——

The Court: What is the relevancy?

Mr. Dezendorf: It is not relevant. It is not that part [95] of the letter we are relying on at all.

The Court: That portion of the letter may be deleted. Is that all right?

Mr. Dezendorf: Yes.

The Court: You delete it right now on the original.

Mr. Nikoloric: I do not even need to go to the trouble if they are willing to agree it is incorrect. That will satisfy Mr. Kolisch.

(Testimony of Thomas H. Prentice.)

The Court: Give me the numbers, from what number to what number, in the booklets?

Mr. Dezendorf: We go from number 101 to 213.

The Court: Exhibits 101 to 213 are admitted.

(Defendant's Exhibits 101 to 213, both inclusive, previously marked for identification, were thereupon received in evidence.)

Mr. Nikoloric: Let me get this straight. Is this just the exhibits we have seen?

Mr. Dezendorf: Yes.

Mr. Nikoloric: You say you have some charts?

Mr. Dezendorf: That is correct, you have not seen them yet.

Mr. Nikoloric: I just wanted to make sure I see them. When are we going to see them?

Mr. Dezendorf: As soon as we get them done, which I [96] imagine will be this afternoon.

The Court: Is that all you have?

Mr. Dezendorf: I have to question the witness on 107.

The Court: What about your other exhibits? Do you have any other exhibits other than the ones which have been admitted, your charts?

Mr. Dezendorf: No.

The Court: Where are the accountant's notes?

Mr. Dezendorf: They had to get the basic information which Prentices were relying upon before they could make up those charts. They worked over the week end analyzing these charts and some of our own. They should be ready, we hope, today.

The Court: Proceed.

(Testimony of Thomas H. Prentice.)

Mr. Dezendorf: Q. Mr. Prentice, you have before you 107 which is dated February 16, 1953, from North Pacific Plywood, Inc., to you; is that correct? A. That is correct.

Q. They and the Buffelens were still having trouble with the dies in their machine at that date; were they not?

A. There again, we had to distinguish, between the dies that they are speaking of, which was already known to us which in the case of North Pacific Plywood had to do with two sets of dies. I think at the time they probably had about 10 or 12 sets of dies, and Buffelen had a couple of sets of dies the same but not all of their dies. [97]

Mr. Dezendorf: That is all.

The Court: That is the whole cross examination?

Mr. Dezendorf: That is correct.

Redirect Examination

Q. (By Mr. Kolisch): This Exhibit 106 that Mr. Dezendorf just showed you, the Mt. Baker Plywood letter——

Mr. Nikoloric: I think it is 105.

Mr. Dezendorf: Yes, that is correct, Mt. Baker, 105.

Mr. Kolisch: 105. There is a statement in here from this company that they would never do business with you any more in the future. Is that a fact?

A. No, it is not a fact.

Q. What is the fact?

(Testimony of Thomas H. Prentice.)

A. The fact is they still do business with us, with the company, with me, too. I mean, the writer of this is a personal friend of mine.

Q. They have bought machinery from you right along?

A. They have bought machinery from us right along, yes, right along.

Q. How about this trouble with the Jackson lathe that Mr. Dezendorf referred to? Do you have any explanation of that? A. Well——

Q. He made the statement at the beginning that there had been a great deal of trouble with the Jackson lathe and it [98] was in ill repute.

A. Oh, no, no, no. There wasn't any of that kind of trouble. There was trouble with it, adjustment, installation, normal trouble, but we are selling that same Jackson lathe today and, as a matter of fact, just did sell another one here just the last week end. There isn't anything about that lathe that has removed it from the market as he seemed to imply there.

Q. How about the Victor clipper; any trouble with that?

A. Yes, we had trouble with it, trouble with all our machinery.

Q. Do you sell the Victor clipper?

A. We sell the Victor clipper.

Q. Is it basically the same Victor clipper?

A. The same.

Q. As to that, when did you start selling the Victor clipper? A. 1949.

(Testimony of Thomas H. Prentice.)

Q. You are still selling that same machine?

A. Still selling the same machine, doing the same job.

The Court: This company that wrote you that it would not do business with you again and then subsequently did business with you, did they ever stop doing business, or did they continue to do business right along?

The Witness: Well, no, during this particular period, your Honor, this is kind of typical of what happened to us out there. These people were losing patience with us. They [95] at this particular time —it seemed like right after that attack their attiture and everything towards us changed.

The Court: Had this company used a Raimann machine?

The Witness: Yes, they had a Raimann machine at that time.

The Court: When was the letter written?

Mr. Dezendorf: December 31, 1952.

The Witness: You see, they became itchy, and I think this can be explained as a part of it.

The Court: That was 30 days after you had won that case completely; was it not?

Mr. Dezendorf: More than that.

The Witness: A little more than that, yes.

Mr. Kolisch: Just about 30 days.

The Witness: But they were still itchy.

The Court: When did they start doing business with you again?

The Witness: Well, it kind of — they kind of

(Testimony of Thomas H. Prentice.)

warmed up towards the spring of 1952 there, and the more we called on them the better. We had to kind of re-pioneer. We had to do the same thing in the last of 1952 and 1953 as we had done in 1947. We had to kind of go out and get started all over again, reacquaint ourselves with these people and start to get in their confidences. That means a great deal to a salesman because the closer you are with them the more leads [100] you get for other sales not only in their particular business but in their neighbors' business. They know what is going on down there, too.

Mr. Kolisch: Q. What was the condition in 1952 of the market for green-end machinery?

A. All of the year 1952?

Q. Yes, all of the——?

A. Well, on the head end of 1952, the earlier part of the year, the demand was good for green-end machinery. These green-veneer mills were getting into operation. I mean people were planning on going into the veneer business because at the time there was a little deficiency of available green-sheet veneer in the market. Then in the latter part of—the see-saw part has been going on in the industry, that has been one of the biggest growth factors here during the recent year or two. First your green end goes in. Then more green ends develop than the capacity to handle, then the next thing you have dry rooms developing to take the slack out of the green-end part of the market. Then they rebuild again until there is more created demand for green ends,

(Testimony of Thomas H. Prentice.)

and right now we happen to be in the particular demand of green ends. The green ends started because there was so much dry-room capacity. The same thing took place in 1952, the same see-saw proposition, so that early in 1952 there was demand for green-end equipment. It tapered off towards the last of 1952, and in [101] its place there was a great demand for dry-room equipment in 1952.

Q. What was the nature of this cancellation of 36 machines from the Raimann Company in, I believe you said, was it March or June of 1952, I am not sure which?

The Court: March.

Mr. Dezendorf: If the Court please, he explained that in his testimony.

The Witness: I think I was in error about that, though. It wasn't a cancellation. It was a delay. It was a delay of the order.

Mr. Kolisch: Q. What do you mean by a delay?

A. Well, as I explained, there was——

Mr. Dezendorf: If the Court please, he is talking about a written document now. He should not argue what the documents said.

The Court: Is there a letter written?

Mr. Kolisch: I think this witness should have an opportunity to explain.

Mr. Dezendorf: That is right, there is.

The Court: Is there a letter written?

Mr. Kolisch: What is the letter?

Mr. Dezendorf: It is the letter of March 24, 1952

(Testimony of Thomas H. Prentice.)

Mr. Kolisch: Well, the letter is in. Your Honor will see the letter. [102]

Mr. Kolisch: Q. You were asked a question concerning orders for Raimann machines subsequent to this letter in 1952, and you, I believe, said that you had no Raimann machines on order. Now, isn't it a fact that you did have orders for Raimann machines from your United States customers right up until July of 1952?

A. Oh, yes, yes, we had orders from them.

Mr. Kolisch: No further examination.

The Court: I do not understand what that means, you had orders from customers.

The Witness: From customers here, and, of course, you see, we had machines in transit, on the water, that were coming in subsequent to this letter.

The Court: Did you have any machines during July, August, and September of 1952 on hand which you could not dispose of?

The Witness: Yes, yes, your Honor.

The Court: How many?

The Witness: We had seven, as I recall.

The Court: Seven machines?

The Witness: That had come in in between the letter of March——

The Court: Did you try to sell machines from July to November, 1952?

The Witness: Yes, sir, we did.

The Court: Raimann machines? [103]

The Witness: Yes, your Honor, we tried very, very hard to sell them.

(Testimony of Thomas H. Prentice.)

The Court: Even though you were involved in litigation?

The Witness: Even though we were. We were still trying to get those commitments on those machines. We were still trying to get those commitments on those.

The Court: When did you sell those seven machines?

The Witness: We started selling them about, well, as I recall, it was about around the end of the spring of 1953 when they started to move again.

The Court: When did you put your first order in again to Raimann for additional veneer-patching machines after——?

The Witness: Well, we had written them in, just shortly before the Associated letters came out, telling them because of the fact that we had these commitments from customers here we wrote them telling them we were about to reactivate those 36 machines again on that order but this time we would be able to do it under specific order defining how those machines were to be constructed more to our desire rather than to the manufacturer's desire. Then that slipped as a result of that letter of Associated. Then we didn't order again, I don't believe, until about February or March, I believe, of 1953.

The Court: Dr. Becker, did you ask him to redesign the machine, to make any changes?

The Witness: Oh, we discussed that together. [104] Oh, yes, we went over together one of the

(Testimony of Thomas H. Prentice.)

machines in the warehouse, went through it piece by piece, went through some of the difficulties of that installation of the machine that we had. We called our installation man down from Vancouver, B. C., to get in on the discussion.

The Court: Did the machines that were shipped to you during the year 1953 contain any differences then, or were they changed in any respect from the machines that you had received in 1952?

The Witness: No, not the early part of 1953. There could have been—no, not materially. I mean there might have been the use of, say, a different type of ball bearing, something like that, but nothing material, the operation all was the same.

The Court: Very well.

Mr. Kolisch: No further questions.

Mr. Dezendorf: No questions.

(Witness excused.) [105]

TIMOTHY F. MAGINNIS

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kolisch): Will you please state your residence, age, and occupation?

A. Yes, my residence is 5306 Southwest Hewett Boulevard in Portland. I am 42 years old. I am a certified public accountant. I also teach.

Q. Since when have you been a certified public accountant? A. Since 1943.

(Testimony of Timothy F. Maginnis.)

Q. Do you have your own accounting business?

A. Yes, I have had my own accounting business since 1945.

Q. Have you done accounting work for the E. V. Prentice Machinery Company and Prentice Machine Works, plaintiffs in this case?

A. Yes, I have.

Q. State your relationship as an accountant for these plaintiffs.

The Court: Are you their regular accountant?

The Witness: Yes, I have been their, and of all their accounting affairs, their bookkeeping since 1951. I have prepared their tax returns, their annual statements, lots of interim statements. I have assisted in various meetings as counselor on many occasions. I have assisted them in [106] connection with their examinations by auditors of various Governmental agencies and have been active with them at all times.

The Court: I think that that qualifies the witness.

Q. (By Mr. Kolisch): I hand you a document marked Plaintiff's Exhibit 52, "Comparative Income Statement" of E. V. Prentice Company, and ask you if you can identify that document?

A. Yes, I prepared this document.

Mr. Kolisch: Copies of these documents were given to the defendant.

The Court: Is that for year to year?

The Witness: This is a statement of the year's operations for each of the years 1948 through 1955.

(Testimony of Timothy F. Maginnis.)

The Court: Do you have one for 1952? That is what I have been waiting to see from the beginning of the hearing. What did you do by the month? How much business was done by Prentice each month, what the cost of doing business was, what the profit was made month by month, that is what I want.

Q. (By Mr. Kolisch): Do you have that information?

A. That information is in the deposition that Mr. Dezendorf took from me up to 1954, I think.

Q. Do you have anything with you from which you could give that information to the Court now?

A. Do you have the deposition? [107]

The Court: I think it will come out on cross-examination.

Q. (By Mr. Kolisch): Will you explain Plaintiff's Exhibit 52?

A. Yes, this is merely a comparison showing the profits for each year for this period of seven years, and in the year 1952 we separated the income from the first six months from that of the last six months as well as giving the total to show the effect on the income statement of that particular period, the last half of 1952. The statement shows sales, cost of goods sold, gross profit, commission income, other income, operating expenses, and net profit for each year.

Q. What material did you use in preparing this exhibit?

A. This is a summary of the statements that

(Testimony of Timothy F. Maginnis.)

I had prepared since 1951 and from the three years' income tax returns prepared prior by my predecessor.

Q. Do you have any reason to believe that the figures shown on this Exhibit 52 are not accurate?

A. They are accurate to the best of my knowledge.

Mr. Kolisch: I offer Plaintiff's Exhibit 52.

Mr. Dezendorf: No objection.

The Court: It may be admitted.

(Document, Comparative Income Statement, previously marked Plaintiff's Exhibit 52 for identification, was received in evidence.)

Q. (By Mr. Kolisch): I will hand you Plaintiff's Exhibit 53. [108]

A. This is the Comparative Balance Sheets showing the year-end balance sheets for each of the eight years, 1948 through 1955, showing their assets and liabilities and net worth at the end of each of those eight years.

Q. Do you have any reason to believe that the figures shown on Plaintiff's Exhibit 53 are not accurate?

A. The figures are accurate, to the best of my knowledge.

Mr. Kolisch: I offer Plaintiff's Exhibit 53 at this time.

Mr. Dezendorf: No objection.

The Court: What is 53?

The Witness: It is the Comparative Balance Sheets for the eight years.

(Testimony of Timothy F. Maginnis.)

The Court: I notice in 1952 you show professional services $6,322. Is that attorney's fees or what?

The Witness: I think the bulk of that is attorney's fees, your Honor.

The Court: Did you not know that I allowed them $7,500 on the following year? Was that a credit you were given on that?

The Witness: Yes, I think you will find in 1953 credit for the attorney's fees when they were received.

The Court: Then they did not show a loss of $8,000 at that time? Isn't this loss more than should have been allowed then? Wasn't that credited back?

The Witness: I was concerned about the tax practice of handling it, and it was properly income when received.

The Court: Are these books not kept on an accrual basis?

The Witness: Yes, they are, your Honor. When did we get this—we thought to get this tax back in 1953.

Q. (By Mr. Kolisch): That was not until January or February, 1953?

A. At the end of 1952, your Honor, we had no knowledge that that refund would be obtained.

Mr. Kolisch: No, the hearing before your Honor was not until the end of January. I think your decision was in May or something. It was quite late, your Honor.

The Court: I was wondering about this loss of

(Testimony of Timothy F. Maginnis.)

some $8,000. On proper accounting practice, would not part of that be allocable to the year 1952, and would not that loss be lower perhaps and the profit on the subsequent year be less?

The Witness: These statements are prepared in accordance with proper tax practice and as the books were kept.

The Court: It would not make very much difference anyway. Proceed.

Q. (By Mr. Kolisch): I show you a document marked Plaintiff's Exhibit Number 54, "Comparative Income Statement" of Prentice Machine Works and ask you if you can identify that, please?

A. Yes, this is a comparison of the income [110] statements for each of the three fiscal years that have passed since the Prentice Machine Works was formed, showing sales, cost of goods sold, gross profit, general expenses, the amount of salaries paid to members of the partnership of E. V. Prentice Company.

Q. Do you have any reason to believe that the figures shown in Plaintiff's Exhibit 54 are not accurate?

A. The figures are accurate, to my knowledge.

The Court: It is admitted.

(Document, Comparative Income Statement; previously marked Plaintiff's Exhibit 54 for identification, was received in evidence.)

The Court: Have you shown these to Mr. Dezendorf?

Mr. Kolisch: Yes, I have, your Honor.

(Testimony of Timothy F. Maginnis.)

The Court: Is there any objection to any of them?

Mr. Dezendorf: No, there is some explanation to them, but there are no objections.

The Court: They are all admitted.

(Document, Comparative Balance Sheets, previously marked Plaintiff's Exhibit 55 for identification, was thereupon received in evidence.)

(Document, Schedule I, Comparative Cost of Goods Manufactured and Sold, [111] previously marked Plaintiff's Exhibit 56 for identification, was thereupon received in evidence.)

(Document, Comparison of Sales and Gross Profit by First and Last Halves of Each Calendar Year, previously marked Plaintiff's Exhibit 57 for identification, was thereupon received in evidence.)

(Document, Comparison of Sales and Gross Profit by First and Last Halves of Each Fiscal Year, previously marked Plaintiff's 58 for identification, was thereupon received in evidence.)

Mr. Kolisch: Plaintiff's Exhibit 55?

A. This is the Comparative Balance Sheets for the Prentice Machine Works for February 28th of each of the three fiscal years that have passed since the firm was established.

Q. With respect to the figures in Plaintiff's Exhibit 55, are they correct, to the best of your knowledge? A. They are.

(Testimony of Timothy F. Maginnis.)

The Court: They are already admitted in evidence so it is assumed that they are correct.

Mr. Kolisch: I did not know that that would mean they are correct, your Honor.

The Witness: They are correct, to the best of my knowledge. [112]

Q. (By Mr. Kolisch): That is true with respect to all these exhibits which I will now offer?

A. Everything I have prepared is correct, to the best of my knowledge.

Q. You have Plaintiff's Exhibit 56, Prentice Machine Works' Comparative Cost of Goods Manufactured and Sold?

A. Yes, that is a schedule supporting the Profit and Loss Statement of Prentice Machine Works. It shows manufacturing costs including purchases of materials, direct labor, factory burden, and the inventory variation to arrive at a cost of goods manufactured and sold for each of the three fiscal years.

Q. I hand you a document, Plaintiff's Exhibit 57.

A. This is a Comparison of Sales and Gross Profit of E. V. Prentice Company by first and last halves of each calendar year, beginning in 1949 and ending through 1954, a period of six years, showing the sales at the first half and the last half and the gross profit first half and last half of each of those six years.

Q. I hand you another document, Plaintiff's Exhibit 58.

(Testimony of Timothy F. Maginnis.)

The Court: All of these documents are admitted in evidence. They are all admitted.

The Witness: This is a similar comparison by the first halves and last halves of each fiscal year that the Prentice Machine Works has been in business, a period of three and a half years. [113]

Q. With respect to the year 1952, do you have your original work sheets with respect to the data that you obtained?

A. With respect to the splits between the first half and the last half of 1952, I have my original work sheets.

Q. Who were they prepared by?

A. They were prepared in July, 1952, that is, not the splits but the information for the first six months period.

Mr. Dezendorf: If I might interrupt for the moment, I find that we have never received copies of 1947 and 1948.

The Witness: I have some spares in my brief case there.

(Discussion off the record.)

Mr. Kolisch: You may examine.

Mr. Dezendorf: I wonder if we could have a short recess so that I could talk to our accountants and get their reaction. I think they have just seen two of those at this moment.

(Short recess taken.)

The Court: Do you want to reopen your direct examination?

(Testimony of Timothy F. Maginnis.)

Mr. Kolisch: Yes, I would like to put in some additional information.

The Court: Proceed. [114]

Direct Examination—(Continued)

Q. (By Mr. Kolisch): Mr. Maginnis, I am going to hand you your deposition which was taken in this case on behalf of the defendant in December, 1953, and direct your attention to page 7 of this deposition as well as five balance sheets and statements of operations of E. V. Prentice Company, and ask you to explain to us what is contained in these documents? I hand them to you now. (Presenting documents.)

A. The deposition is a transcript of the books that was taken at the time I was under questioning by Mr. Dezendorf. These statements are those that I prepared currently through the year 1952 as a part of my service to the E. V. Prentice Company. I prepared a statement for the P. and L. for the first four months, January, February, March, and April.

The Court: What is that marked?

Mr. Kolisch: That is not, your Honor.

The Court: Mark them right now. Mark that Number 70.

Mr. Kolisch: Mark them serially.

(Document, Balance Sheet, April 30, 1952, marked Plaintiff's Exhibit 70 for identification.)

(Document, Balance Sheet, May 31, 1952,

(Testimony of Timothy F. Maginnis.)

marked Plaintiff's Exhibit 71 for identification.) [115]

(Document, Balance Sheet, June 30, 1952, marked Plaintiff's Exhibit 72 for identification.)

(Document, Balance Sheet, August 31, 1952, marked Plaintiff's Exhibit 73 for identification.)

(Document, Balance Sheet, November 30, 1952, marked Plaintiff's Exhibit 74 for identification.)

The Witness: For the first four months, January through April, a statement for the month of April, May, and for the first five months, and a statement for the month of June and for the first six months.

Mr. Kolisch: Will you mark each one of those separately, giving them an exhibit number.

The Court: The statement for the first four months is Number 70; for the month of May, 71; for the month of June, 72. What is the next one?

The Witness: For the months of July and August and for the first eight months.

The Court: 73.

The Witness: For the months of September and October and the first ten months.

The Court: Number 74.

The Witness: And the 12 months will appear [116] in the comparative statements I have already submitted.

(Testimony of Timothy F. Maginnis.)

The Court: The last one has already been marked?

The Witness: Yes.

Mr. Kolisch: Let us not offer that one then, 75. There is a document the same as 75 already in.

The Clerk: The last one is Number 74.

Mr. Kolisch: Yes.

Q. Referring to page 7 of your deposition, will you read into the record the information there contained concerning the operations of E. V. Prentice Company?

The Court: Instead of doing that, Mr. Kolisch, will you some time today set out on the left-hand side the months and the total sales, and on the right-hand column the commissions just as shown in the deposition.

Mr. Kolisch: Yes, your Honor.

The Court: Mr. Maginnis, are those figures on page 7 of the deposition correct, to the best of your knowledge?

The Witness: Yes, they are correct, to the best of my knowledge.

Mr. Kolisch: I think that is all.

Cross Examination

Q. (By Mr. Dezendorf): Mr. Maginnis, is it correct or is it not correct that some sales made in 1951 were actually carried over into January and February of 1952? [117]

A. Only after the title actually passed in Janu-

(Testimony of Timothy F. Maginnis.)

ary or February, 1952. To my knowledge, there were no sales carried over, Mr. Dezendorf.

The Court: Will you read that answer?

(Answer read.)

The Witness: To my knowledge, the only sales recorded in January and February of 1952 are those where shipment was made and title passed in January and February, 1952.

The Court: Orders that were taken in 1951 but not shipped until January or February of 1952 were recorded on the later date?

The Witness: That is right. That was typical of any sale. Any sale was recorded when it was shipped.

Q. (By Mr. Dezendorf): So that, so far as your testimony is concerned, the January, 1952, sales, as recorded, unquestionably included orders that were taken in 1951?

A. Without a doubt, Mr. Dezendorf.

Q. That would be true also of February, 1952; would it not? A. Yes, probably.

Q. Mr. Maginnis, isn't it a fact that the gross sales of the Prentice Company fell off considerably the second quarter of 1952?

A. You are referring now to shipments, I presume?

Q. Well, to sales as you have recorded them.

A. As I have recorded them, the record [118] indicates there were more sales in the first quarter than there were in the second.

(Testimony of Timothy F. Maginnis.)

Q. In other words, they fell off in the second quarter?

A. There were more sales in the first quarter than in the second; that is quite right.

Q. That was considerably before the July 25, 1952, letter; was it not?

A. Well, now, that is something that is out of my territory. I don't know anything about the letters.

The Court: I think that is right. He is just testifying as to the books.

Q. (By Mr. Dezendorf): Referring to Exhibit 57, and perhaps you should get that before you if you do not have it before you.

(Document presented to the witness.)

Q. Referring to the year 1952, Mr. Maginnis, in the period January to June you have kept Gross Sales $576,650.81; right? A. Right.

Q. Gross Profit of $163,699.45; right?

A. That is right.

Q. So that there is a percentage ratio of approximately 29 per cent; is that correct?

A. Yes.

Q. Referring again to the year 1952 and the period July-December, you have kept Gross Sales $230,185.76; right? [119] A. Right.

Q. And Gross Profit of $24,811.29, or a ratio of approximately 10 per cent; is that correct?

A. That is right.

Q. How do you explain that?

A. In our accounting system we costed out each

(Testimony of Timothy F. Maginnis.)

sale as it occurred so that we were able to determine our gross profit at the end of any period, and the profit of one hundred sixty-three thousand is what was revealed by the books on June 30th when I prepared the statement at that time.

The profit of twenty-four thousand is what remained for the twelve-month period after subtracting the first six months.

Q. Then for the year 1953 in the January to June column you have Gross Sales of $167,541.39; right? A. Right.

Q. And a Gross Profit of $54,469.90; correct?

A. Right.

Q. A percentage of approximately 31 per cent?

A. In which period?

Q. In that period. A. For the whole year?

Q. No, January to June.

A. How much did you say?

Q. Approximately 31 per cent. [120]

A. Yes, it is about that.

The Court: Did you take an inventory at the end of each accounting period?

The Witness: No, we cost out our machinery as we sell it. We know what it costs us so we apply those costs against those sales as the sales occur.

The Court: You have never made any audit verification, have you?

The Witness: Yes, I made an audit.

The Court: When?

The Witness: On January 31, 1951.

The Court: When again?

(Testimony of Timothy F. Maginnis.)

The Witness: That is the last time.

The Court: You have never made an audit verification. You relied solely on the figures given you by the Prentices?

The Witness: Not entirely, your Honor. That is not my method of operation. When I prepare a statement, even though it is not a certified statement, I do my very best to have the figures accurate. Now, if I am not preparing a certified statement there are certain verifications, but I do not actually physically count the inventory. I do not ascertain the receivables. I ascertain to the best of my knowledge if the figures are accurate, and I make tests to determine that by inquiry, by examination of the books and whatever sources of information available to me. [121]

Q. (By Mr. Dezendorf): Will you get Exhibit 58 before you if you do not have it?

(Document presented to the witness.)

Q. Referring to the first fiscal year.

A. Yes.

Q. Sales, March 1st to August 31st show $129,203.68; correct? A. Yes.

Q. Cost of Sales, $97,153.76? A. Yes.

Q. Gross Profit of $32,049.92? A. Yes.

Q. That is a percentage of approximately 25 per cent; is it not? A. Right.

Q. Now, through the period September 1, 1952, to February 28, 1953, the Sales were $16,722.75; right? A. Right.

(Testimony of Timothy F. Maginnis.)

Q. Cost of Sales $23,482.82, minus Gross Profit of $6,760.07 or approximately a minus 25 per cent?

A. Right.

Q. Correct? A. Right.

Q. How do you explain that?

A. Well, this is a manufacturing business, [122] Mr. Dezendorf, and we determined our cost of sales as we produce the machinery, and the cost that we had determined up to, for these particular sales that I report here was ninety-seven thousand dollars, and an additional cost of operating the plant applied to the other sales produced a loss. In other words, for machinery we manufactured, the sixteen thousand dollars worth, our cost exceeded that.

Q. Do you have actual inventories for Prentice Machine Works by months?

A. Well, we allocate each item to the machine as we acquire it. All materials are assigned to the particular machines as the machines are in process of manufacture so the costs are ascertained in that way, are built about materials, labor, and the allocation of burden.

Q. Do you value work in process at the end of the period? A. Yes.

Q. Are you familiar with the experience of other houses that were supplying articles to the plywood trade during the year 1952?

A. I have no other plant in the plywood machinery business, Mr. Dezendorf.

Q. Do you know as a fact that the experience of other businesses supplying heavy machinery to

(Testimony of Timothy F. Maginnis.)

the plywood industry was identically the same as the pattern of Prentice in the year 1952? [123]

A. I don't know that, Mr. Dezendorf. I have no information or have seen none to date on that.

Mr. Dezendorf: That is all.

The Court: I do not understand the figures on the manufacturing plant. Could you let me see those figures?

(Document presented to the Court.)

The Court: Do you account for the loss from September 1, 1952, to the end of February, 1953, by the fact that you allocated to the small sales the overhead expenses of the plant?

The Witness: No, I account for it, your Honor, by the fact that the plant was operating way below capacity during that period of time. We had a lot of costs, continuing costs that had to be absorbed in the particular part of the business we did.

The Court: You do not know when the $16,722.75 business was done, do you?

The Witness: Yes, the record will show definitely when the business was done, your Honor. I do not have anything at hand to tell me when, but the Prentice Machinery Company records are quite complete as far as showing the monthly sales.

The Court: Were they producing the same type of machine beginning September 1, 1952, that they had produced prior to that time, or are you not acquainted with that fact?

The Witness: Well, I would be reluctant to try [124] to make a statement about it. It is too hazy

(Testimony of Timothy F. Maginnis.)

in my mind at this time. I did go in their plant frequently and could see what they were building, but I wasn't particularly concerned about their items of production.

The Court: That is all.

Mr. Kolisch: No further questions.

Mr. Dezendorf: That is all.

(Witness excused.) [125]

NORMAN WORKMAN

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kolisch): Will you please state your residence, age, and occupation, Mr. Workman?

A. My residence is 4381 Southwest Fairview Boulevard in Portland. I am 37 years old. I am a certified public accountant.

Q. When did you become a certified public accountant? A. In February of 1949.

Q. Do you have your own office?

A. I am a partner in the firm of Workman, Shepard, and Company.

Q. Where is that firm located?

A. Here in Portland in the Cascade Building.

Q. How long have you had this partnership?

A. Four years now.

Q. Mr. Workman, what is your connection with this case?

A. Well, you asked me some time in 1953 to

(Testimony of Norman Workman.)

come in as an outside public accountant and to make an analysis and study of certain features of the company's operation to see what the situation was with respect to their operations during that period of time.

Q. Have you done this, Mr. Workman? [126]

A. Yes, I have.

Q. How is your work represented in this case?

A. Well, it for the most part is contained in voluminous and detailed working papers which analyze the sales and the cost of sales of both the Prentice Company and the Prentice Machine Works.

Q. What did you do with the information that you obtained as a result of this analysis?

A. That has been handed to Ivan Bloch and Associates for their purpose in preparing charts.

Q. Do you have your analysis sheets with you?

A. I have the papers here in Court, yes.

Q. What source of materials did you use for your figures in your analyses?

A. Well, I have used the basic records of the company which consist, for my purposes, of the sales account and the general ledger, the detailed sales records of the company, copies of invoices sent to customers, and the order book.

Q. Were these all original documents of the Prentice Sales Company and the Machine Works?

A. That is right.

Q. Have you made an analysis of the average gross profit earned by the Sales Company on the

(Testimony of Norman Workman.)

sale of Raimann patchers during the period July, 1952, to September, 1955?

A. Yes, I have, and the figures, as taken from [127] the books, indicate the gross to be 43½ per cent of the sales price.

Q. In terms of a dollar value, what was the average gross profit on the sale of a Raimann patcher?

A. During that period of time the average which is spread over some hundred machines was $3,785.

Q. What factors did you take into consideration in determining this figure?

A. I took the book sales as recorded which came, of course, from the invoices to the customers, and I took the cost of sales as recorded in the books.

Q. Did the sales price of the machine vary over this period of time? A. Yes, it did.

Q. Between what figures did it vary? Do you want to refer to your notes if it would be helpful?

A. I would like to have my notes, if I may.

(Documents presented to the witness.)

Well, I can cite three representative amounts in an answer to your question.

In June of 1952 the sales price was $8,000, and the recorded cost on it was $4,531. January, 1954, their sales price went up to eighty-five hundred, and the cost was up to forty-seven fifty-three, and in June of 1955, which is the last change of note, the sales went to eighty-eight hundred dollars per

(Testimony of Norman Workman.)

machine, and the cost is recorded as fifty-one hundred. [128]

Q. With reference to the Prentice Sales Company, can you tell me what the gross profit of this company was with respect to machinery which it sold other than the Raimann machine during the period, July, 1950, to September, 1955?

A. Yes, I can. My analysis shows that that gross profit percentage is 22½.

Q. How did you compute this 22½ per cent figure?

A. Well, that once again is based on the recorded sales in the books and recorded cost of sales of that machine or machinery.

Q. I take it this 22½ per cent figure is an average one which you reached?

A. Yes, it is average for the period of the review; that is right.

Q. With respect to the Machine Works, can you tell me what the gross profit of the Machine Works was from its inception in, I believe, February or March of 1952 until September of 1955?

A. Yes, I can. The over-all profit, gross profit of the Machine Works, appears to be 30.6 per cent. Now that figure is based upon both machinery and parts and service, but the gross profit on the machinery alone was 30.8 per cent.

Q. Did you arrive at these figures in the same way as you did with respect to the Sales Company?

A. Yes, I did. [129]

Mr. Kolisch: You may examine.

(Testimony of Norman Workman.)

Cross Examination

Q. (By Mr. Dezendorf): Are commission sales in any of those percentage computations?

A. Yes, they are. They are in the other machinery.

Q. In what?

A. In the other, in the machinery other than Raimann patcher amounts.

Q. They are in the 22½ per cent?

A. Yes, sir.

Q. If so, assuming that they are, how much of the percentage would be allocable to commission sales out of the 22½ per cent?

A. I have made no segregation of the commission sales.

Q. What percentage did you use for commission sales?

A. The percentage as recorded—maybe I should explain it this way. A commission sale is recorded on the books as a regular sale, and the cost of sales which is recorded is the amount which the company will have to pay to the supplier for the machinery. In other words, the gross profit which will show up is the commission. They do not regard it as commission sale; they regard it as a straight sale.

The Court: Is there any difference between the amount of gross profit between a commission sale [130] and a sale where the inventory is kept by the company?

The Witness: I would assume there was. I can-

(Testimony of Norman Workman.)

not answer the question. I don't have the information.

Q. (By Mr. Dezendorf): Do you have a breakdown by years of the percentage rather than the over-all for the entire period?

A. I do not have that prepared; no.

Q. How did you arrive at an average if you did not prepare it by the years?

A. What I have done, I have added—the figure which you have is a total of the sales for the months of the period. In other words, the total of the sales of 1952, August, September, and so forth, all of 1953, all of 1954, and all of 1955 for, in this particular case, Raimann patchers. I have done the some thing for the other machines. It is also a total of cost of sales for those months, and I have figured your gross profit based upon those totals.

Q. So that you just lumped the whole thing together?

A. The whole thing is together for the percentage; yes.

Q. Even though they keep commissions separately on their books?

A. They have a commission account which is represented by certain machinery but not by others. The commission account is shown as an income account. Other sales which they, in effect, sell on commission are recorded as straight sales. [131] They are intermingled with all sales; consequently, I have not separated those from the gross amount.

Mr. Dezendorf: No further questions.

The Court: Mr. Kolisch?

Mr. Kolisch: No questions.

The Court: That is all.

(Witness excused.)

(Discussion off the record.)

The Court: We shall recess until 10:00 o'clock tomorrow morning.

(Evening recess taken.) [132]

December 13, 1955, 10:00 A.M.

Trial Resumed

The Court: You may proceed.

Mr. Kolisch: Call John H. Davidson.

JOHN H. DAVIDSON

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kolisch): What is your residence, age, and occupation, Mr. Davidson?

A. My residence is 5630 Southwest Hamilton Street. I am 30 years old.

The Court: How old?

The Witness: 30.

The Court: I know Mr. Davidson. You do not need to go any further.

Q. (By Mr. Kolisch): What is your occupation, Mr. Davidson?

A. I am a professional engineer and an administrative consultant with the firm of Ivan Bloch and Associates.

(Testimony of John H. Davidson.)

Q. Are you a statistician? A. Yes, I am.

Q. Will you state what your qualifications are to testify as a statistician in this case?

A. I am a graduate of the Oregon State College in the schools of Industrial Engineering and [133] Mechanical Engineering and took courses from Dr. Lee at Oregon State College. I worked about four years in the Government service directly for Bernard Goldhammer as a statistician, as the agricultural consultant for the Administrator. During that time I prepared statistical analyses which were used for forecasting power requirements for industry and agriculture. I also worked on some research to develop better statistical methods of computing water run-off from weather and snow.

Q. What was your connection with Bonneville?

The Court: I know all that. That is a long time ago. I think he is qualified. Is there any question about it?

Mr. Dezendorf: None.

Q. (By Mr. Kolisch): Were you asked to make a statistical analysis regarding the businesses of the E. V. Prentice Machinery Company and the Prentice Machine Works? A. Yes, I was.

Q. Specifically, what were you asked to do?

A. I was asked to take the sales data and analyze this data over the length of each of the phases of the business and compare this data to pertinent indices of the plywood industry.

Q. What period of time were you requested to analyze?

(Testimony of John H. Davidson.)

A. It depends on—in every case it was the length of the particular phase of business.

Q. By that you mean from the beginning of the business? [134]

A. From the very beginning. For instance, I am told that the Raimann machines, the first sales were in July of 1950. The machinery company began operations in September of 1947. In each case I analyzed from the beginning of the business.

Q. Over how long a period of time have you been engaged in this statistical analysis?

A. It has been almost a year and a half now on this particular project.

Q. I ask you to look at a chart which has been marked Plaintiff's Exhibit 59, referring to the Raimann machine sales. I believe you have it right on the blackboard. If you want to step down for you to explain it, it might be helpful.

A. Thank you.

The Court: Tell us what those lines mean.

Q. (By Mr. Kolisch): Will you start explaining to the Court what you have on these charts.

A. Well, starting from the bottom of this chart, we have a jagged line which represents the monthly sales of the Raimann machines, and that line starts at July, 1950, and runs up to September, 1955. The scale for that is on the left in terms of the number of patchers sold. The next line——

Q. Which line are you referring to now?

A. It is this dotted red line.

Q. All right, supposing you label that line with

(Testimony of John H. Davidson.)

a letter so that we know what you are talking about. Give it letter A or whatever—— [135]

A. I will give that letter A, and I will mark that in solidly. (Marking on exhibit.)

Q. What is that line A extending from July, 1950, until July of 1952?

A. That line is the trend line computed by the method of least squares of actual sales during that period. I might add that the method of least squares gives no room for any choice in that line. There is only one line which can be computed by that method, and it is exactly this line, and it exactly represents the sales over that period.

Q. Could you give us a brief explanation as to what this method of computing a trend line is which you have referred to as least squares?

A. It is a method which is in common use by statisticians to analyze data of this type. It is based on the theory that the—I am a little hesitant to go into a mathematical explanation completely.

Q. Do you have a formula with which you are working?

A. There is a formula which produces only one line, and that line is based on the fact that the sum of the residuals of the differences between the actual—between the computed line and the actual point is at a minimum. The sum of the squares of those residuals is at a minimum. There can only be one line having that qualification. [136]

Q. How does this method of computing the

(Testimony of John H. Davidson.)

trend line, how does this compare with other methods of computing sales over a period of time?

A. Well, in this case this would be the only line that would be able to be used.

Q. Are there other methods to prognosticate sales?

A. Yes, there are. It depends upon the situation in each general case. There are certain general methods.

Q. In this specific case with this business, how does this trend line compare as a method of computing sales with other methods?

A. I feel that there is no other way to use. This is the only method to use analyzing data of this type in this general situation.

Q. Will you now proceed with your explanation of the other lines?

A. This lowest red line, I will mark that in to make it stand out from the other one, and I will also mark it "A." (Witness marks on exhibit.)

I will mark that A-2, and that one is A-1. A-2 was computed in exactly the same manner as A-1. It covers the period from July, 1952, through September, 1955.

Q. What are those jagged lines on the right-hand side? What do they represent?

A. You are referring to these lines? (Indicating on exhibit.)

Q. Yes, I am. [137]

A. Those are exactly the same as these lines over here. (Indicating.)

(Testimony of John H. Davidson.)

Q. Excuse me, you do not mean exactly the same?

A. They represent the same thing inasmuch as they represent the actual monthly sales of Raimann machines during this period.

Q. As I understand it then, you have plotted on this chart the actual sales of Raimann machines from a period beginning in 1950 through and until September of 1955? A. That is right.

Q. And you have also drawn two trend lines, line A-1 representing the trend of sales of Raimann machines from 1950 until 1952, and line 2 representing the trend of sales of Raimann machines from July, 1952, until September of 1955?

A. That is correct.

Q. Will you please explain the third dotted red line?

A. That is this line (indicating). That line is a line representing the number of machines that should have been sold if the business had proceeded in a normal fashion. That line was derived by analyzing the slope of this line——

Q. Which line is that?

A. ——A-1 and the slope of A-2.

Q. Do you want to label that A-3?

A. I will label that A-3 (marking on exhibit).

Q. Looking at those three lines, A-1, A-2, and A-3, what information do they give you concerning [138] the number of Raimann machines which should have been sold, according to your computations, between July of 1952 and September of 1955?

(Testimony of John H. Davidson.)

A. The number of machines that should have been sold—and this is by my computation and it is also by methods which any statistician would come up with—amount to 78 machines, and it is represented in this area (indicating). It is actually 78.17.

Q. Will you write in the number 78?

(Witness writes on exhibit.)

Q. Will you also look at the chart and tell us how many machines were actually sold between the period 1950-1952?

A. I will have to look at the—I believe it was 61 machines, but I would like to check with the document from which this was prepared.

Q. Do you have your papers here?

A. They are back at my place.

The Court: Proceed.

(Witness produces documents.)

The Witness: I was correct. That was 61 machines.

Q. (By Mr. Kolisch): 61 machines are the number of machines actually sold prior to July, 1952?

A. That is correct.

Q. How many Raimann machines were actually sold subsequent to July, 1952, until September, 1955?

A. That is 132 machines. [139]

Q. Moving up the chart, will you please——

The Court: Did they do more than you anticipated? They were supposed to sell 78, and they sold 132?

Mr. Kolisch: No, your Honor. Would you ex-

(Testimony of John H. Davidson.)

plain to the Court how you came to the number 78?

The Witness: I had the advantage in computing these of hindsight, which is something a statistician often does not have, that I had an actual sales record from this period which——

Q. (By Mr. Kolisch): What period is that?

A. From July, 1950, through July, 1952, in which case the actual sales records indicate there were 61 machines sold. Actual sales records also are available from the period July, 1952, through September, 1955, and during that time actually there were sales of 132 machines; however, according to my computations, there should have been many more sales than those.

Q. How do you know that there should have been? What line there tells you that?

A. Line A-3 is the result of my computations. I might add that the——

The Court: How many machines should they have sold?

The Witness: They should have sold the sum of 78 and 132. They actually sold 132. They should have sold an additional 78, 78.17. [140]

The Court: You can make a statistical study and prophesy on a small sum like this when the item is as costly as a Raimann machine? Are you not applying the same technique you do to Wrigleys Chewing Gum to an anticipation of this kind?

The Witness: I have felt in my analysis that, as I stated, I was very fortunate in that I had hindsight instead of foresight. I looked at what

(Testimony of John H. Davidson.)

actually was the case. In other words, I know the rate—this line A-2 we will use as an example. It shows, and that was computed by a method which will only give us one line, it shows that each month there were a certain number of more machines sold than the previous month, and that establishes an actual rate of growth which we are fortunate that we have. We have the history. We are not standing here and guessing at the future. We actually know what did happen. I averaged that rate with this rate that I had in the period before July, 1952, and took the average of those two and applied it from this point.

The Court: In other words, between July and November of 1952 there were little or no sales; is that right?

The Witness: The record indicates that between July and November there were absolutely no sales.

The Court: How do you know that the sales that they made in February and March and April of 1953 were not sales that they ordinarily would have made during the critical period, that is, between July and November, 1952? [141]

The Witness: The actual sales made then are so low that, well, let's examine the record. On March of 1953 there were no—there was only one machine sold between July, 1952, and March of 1953. Then there were four machines sold over the next two months and then three months of no sales.

The Court: How do you know that the various partners were not sitting in their office using their

(Testimony of John H. Davidson.)

telephone, eating lunch at the Arlington Club all day long, rather than going out and selling the way one of the partners suggested?

The Witness: I do not know that. I am merely a statistician. I was given this data to analyze, and from my standpoint it was obvious that something happened in the middle of 1952 that extended over a considerable range of time.

Q. (By Mr. Kolisch): You do not pretend to know what actually went on in the business. You were just given figures, and you have made statistical analyses from them; is that correct?

A. That is correct; that is correct.

The Court: That is right, I think that there is no question that during the period of six months there were no sales, and there is a definite correlation between the lawsuit and the lack of sales, but I do not see how anyone can anticipate with any degree of accuracy where you have such a small sum and where the items are so expensive and [142] where the sales were dependent upon so many other factors.

Mr. Kolisch: I will ask Mr. Davidson the question.

Q. From your experience did you have sufficient sampling to make up these charts? Did you feel you had sufficient information to go ahead and do what you did?

A. Yes, I did or I would not have done it. As a matter of fact, on the next chart I, as you know,

(Testimony of John H. Davidson.)

would not make a trend line because I did not feel there was enough data.

Q. That is right, you will come to that.

A. I would like to qualify it this way too. Your point about one small sum is a very important one in this type of case. I have only looked at the long term, at the long—at the trend over a long period of time, and I have, I feel, justifiably measured over a long period of a number of years the complete analysis of a company which brings out this line. Now I would hesitate because of the long-term nature and because of the danger of taking too small a sample of taking any little portion like a quarter of a year and saying that that indicated what the actual business should have been. I think I am only justified in such a statistical study in taking a long period of time because, otherwise, certainly the sample would be too small, but, as far as forecasting, as I have said, I have the advantage here of not having to stand at this point and guess what the future is going to be. I stand at this point and analyze what actually happened. I see what [143] was actually the case this time. I see that this was actually the fact here (indicating).

Q. When you say "this" would you be a little more definite because the record does not make clear although the Judge would follow you.

A. I see that A-2 is actually the situation. That is an actual statistical computation that results in A-2.

The Court: You believe that that isolating one

(Testimony of John H. Davidson.)

fact you can attribute all of the sales or the lack of sales to this one fact?

Q. (By Mr. Kolisch): Have you isolated any facts?

A. I was trying to see if I had.

The Court: You are taking the fact that no sales were made during a period of six months; you are making a graph and showing the trend. Now you do not know whether the production was improved or whether they had trouble with the product or whether they had exerted additional sales efforts or advertising, or the market conditions at that time; on that particular chart you have made nothing of that kind, have you?

Mr. Nikoloric: Your Honor, we are not making such claim. This is a piece of evidence which we consider to be relevant. We are not saying, in presenting this affidavit to you there is no single piece of evidence which we have relied on. There may be other qualifying factors. Maybe there was a [144] slump in the industry. Maybe the Prentice boys did not go out and sell. Maybe the plywood business was in a terrible slump over these periods of years. If so, those pieces of evidence are relevant and qualify and cut down the figure that Mr. Davidson is giving you now.

The Court: I appreciate that, but I am just wondering about the relevancy of a piece of evidence which is so narrow in its aspects.

Mr. Nikoloric: It is narrow; there is no question about it, but, as Mr. Davidson testified, it is

(Testimony of John H. Davidson.)

an accepted way of measuring such data. I want to make it clear, your Honor, that we through this entire presentation are doing nothing that has not been done in hundreds of antitrust suits and with which I am personally familiar. We are presenting you with all of the available statistical, economic, and other data that will bear on an assessment of damages. The rule in these cases always is that the finder of fact, whether it is the jury or a Court, has got to take these various pieces of information and come up with the best answer he knows how or they know how. You cannot assess damages to the penny in an antitrust suit. You have got to take a large mass of data and do the best you can with it. If that is a trite or a colloquial way of saying it, we do not pretend, and we will not take the position certainly that you can measure the damages to the penny. This is just something we [145] present to you for what it is worth. We happen to think it is worthwhile considering. If your Honor feels that an attack is made against it which is a valid attack, you do not have to consider it.

The Court: I am going to listen to your testimony. Frankly, I might say I do not think it is worth very much.

Mr. Nikoloric: That is up to you, your Honor.

Q. (By Mr. Kolisch): Moving up to the chart, will you please explain what that jagged black line is? A. This line? (Indicating.)

Q. Give it a number or letter.

A. We will call this C-1. That refers to this

(Testimony of John H. Davidson.)

black line which measures the actual monthly production of the plywood industry over the period in question.

Q. That is the actual production of plywood?

A. That is correct.

Q. Where did you get this information?

A. I secured this from the records of the Department of Commerce. They put out monthly and annual records, or they did up until the middle of 1953. And then I used the data from the Douglas Fir Plywood Association.

The Court: That is something I am interested in. What line are you talking about now?

The Witness: Now we are talking about C-1 which is this black line right here (indicating).

The Court: Yes?

The Witness: It is the monthly production. Its scale is on the right. It is the monthly production in terms of million square feet of plywood of the soft-wood plywood industry in the United States.

The Court: That is that second line?

The Witness: That is that second line. It starts on the left at the figure 8 on "Patchers sold."

The Court: Do you have figures on the Pacific Northwest?

The Witness: Although this is for the United States, it is almost all in the Pacific Northwest.

Mr. Kolisch: It is the soft-wood plywood production, your Honor.

Q. What is the red line that runs through the black line?

(Testimony of John H. Davidson.)

A. That again is a trend line. It is a trend line computed by the method of least squares in exactly the same manner as I computed the other trend lines.

Q. Would you give that line a letter?

A. We will call this one C-2.

Q. What is the next line above that?

A. The blue line on the top.

Q. Give it a letter, will you, please?

A. I will call that D-1.

Q. Just D. You do not have any other line.

A. All right, D is sufficient. That represents the [147] production capacity of the plywood industry in the western part of the United States and British Columbia and Alaska.

Q. What is the production capacity? Please explain what you mean by that.

A. The production capacity is a figure, an annual figure which relates to the amount of plywood that a particular plant would produce if it operated at 100 per cent through the year.

Q. Is that productive capacity related to the productive plywood-making machinery that such a plant has? A. It certainly is.

Q. Is the blue line a trend line, or what is the blue line?

A. The blue line is not a trend line because in this case it was my judgment that with only annual figures to work with it was better to state them as such and not compute a trend line.

Q. Where did you get your figures?

(Testimony of John H. Davidson.)

A. These figures came from the Timberman Magazine.

Q. What is the Timberman Magazine?

The Court: There is no attack on the validity of his figures. I think that is agreed. He took good figures.

Mr. Kolisch: Is that all right?

Mr. Dezendorf: Yes.

The Witness: I would like to point out that this line does indicate an increase in productive [148] capacity. In other words, new mills were built every single year from the time that—from 1949 that I have shown at the start right up to the present date.

Q. (By Mr. Kolisch): Do you know whether or not the type of machinery which the Prentices sold has to do with the productive capacity of the plywood market of plywood mills?

A. I understand that they sell machinery which is used throughout the plywood, throughout the plant in producing plywood, and therefore they would have this in potential if you sold machinery to each of the new mills as represented by this increase in productive capacity.

Q. Will you turn to the second chart now? I offer in evidence Plaintiff's Exhibit Number 59.

The Court: It is admitted.

(Chart by Mr. Davidson previously marked Plaintiff's Exhibit 59 for identification, was received in evidence.)

Q. (By Mr. Kolisch): Mr. Davidson, will you

(Testimony of John H. Davidson.)

please go through a similar explanation and tell us what this Plaintiff's Exhibit 60 is?

A. Starting with the jagged black line?

Q. Please give it a letter also.

A. We will call it E. This line measures on a monthly basis the dollars of sales of the Prentice Machine Company for machinery other than Raimann patchers. [149]

Q. This is the sales company you are talking about?

A. This is the sales company, and the statistics in this case are available from September of 1948 through July, 1952, and to September of 1955.

Q. With respect to both these charts, I did not call your attention to a vertical line which goes through at July of 1952.

A. I have it indicated by a dot.

Q. Perhaps you had better give that a letter and make that the same on both charts, and we will just make a note of that. Why don't you just mark that. A. Mark it X?

Q. Mark it X.

(Witness marks on exhibits.)

Q. As I understand it, the date you were given when the Associated letters were sent out was July, 1952? A. That is correct.

Q. Will you proceed with your explanation?

A. The next line——

Q. What is the next line?

A. ——that I will discuss is this dotted red line which extends from September, 1948, up to the

(Testimony of John H. Davidson.)

line marked X, and I would like to emphasize that line. I would like to emphasize it because I want to show that it stops at X, and we can call that line F. That line again is a trend line computed by [150] the method of least squares, which represents exactly what the actual sales were.

Q. That trend of sales, do you mean?

A. What the trend of sales were measured by the actual amounts over the period September, 1948, up through July, 1952. It shows a rather rapid rise on a long-term basis.

Q. Dollar-wise, can you tell us what the actual sales of the Prentice Sales Company were from 1948 to July of 1952?

A. Again I'll have to look at my charts.

The Court: $1,383,182?

The Witness: Yes, sir, that is what I have.

Mr. Kolisch: Go ahead, write it in.

(Witness writes on exhibit.)

Q. Proceed with your explanation.

A. The next line is this lower dotted red line which I will give the letter F-2. I would like to change this to F-1 from F and make this one F-2, and again I will emphasize it. That line is a trend line computed by the method of least squares for the period from July, 1952, and through September, 1955.

Q. What information did you use to compute F-2?

A. I used information secured from Mr. Workman.

(Testimony of John H. Davidson.)

Q. Looking at your chart, what is the—don't you have special information recorded there in the form of a solid jagged line? [151]

A. Excuse me, it represents data shown by this solid jagged black line.

Q. Give the solid jagged line a letter G.

(Witness writes on exhibit.)

Q. As I understand it, G represents the actual sales of Prentice Sales Company between the period 1952, July, 1952, and September of 1955?

A. That is correct.

Q. Will you go up to the chart and please tell us what the next line is?

A. The next line which we will give the letter H is a line computed in the same manner as the line was computed on the previous chart, which measures what the business should have done if business conditions or selling conditions had remained normal.

Q. So H is a trend line of what the business should have been, according to your computations, had there not been some interference?

A. That is correct.

Q. All right now, what figures do you come up with as a result of these different lines that you have testified to, particularly the trend lines, with respect to the sales company?

A. First I will fill in a comparable figure here of actual sales to compare with this number. [152]

Q. Are you going to tell me the actual sales of the sales company subsequent to July, 1952?

(Testimony of John H. Davidson.)

A. That is correct.

Q. Put it down.

A. $864,444 (writing on exhibit). Then the line above represents the gross sales that should have been expected.

Q. What is that figure?

A. And that figure measured in terms of gross sales lost, in other words, the difference between what actually was and what should have been——

Q. That is the difference between H and F-2?

A. That is correct; $1,838,022.

Q. Write that figure in.

(Witness writes on exhibit.)

Q. There is another jagged line, I believe. I cannot see it very well on my chart. It is jagged beneath the solid line G. Will you please explain what that is?

A. That is this blue line which we had better give a number and call it J, and that blue line represents the sales of the Prentice Machine Works, and it covers the period from March, 1952, to May, 1955, this line (indicating).

Q. That is line J?

A. Line J. I referred to it previously by saying that there was a line in which I did not feel that there was sufficient data for the periods involved [153] to make a trend analysis. That is this line, line J.

Q. Did you compute without the use of a trend line what the gross lost sales of the machine company would have been? A. Yes, I did.

(Testimony of John H. Davidson.)

Q. What is that, and please explain to us how you did it.

A. Well, first, that amount is $896,403, which I will write in in parentheses.

(Witness writes on exhibit.)

That was computed in this manner: Since I did not feel I could make a trend line, I actually measured or added the sales by the Prentice Machine Works over the period for which records of it are available, this period from March, 1952, through May of 1955. Then I also added over exactly the same period the sales of the Prentice Machine Company for sales other than Raimann patchers, and I then compared the per cent that one was of the other. That amounted to slightly less than 50 per cent.

Q. Do you remember what the actual figure was?

A. I will have to look at my charts again.

Q. All right, look at your notes.

A. That is 48.77 per cent.

Q. By use of this 48.77 per cent volume of business of the machinery company as opposed, as contrasted to that of the sales company, you came up with a gross-lost-sales figure for the machinery company? [154] A. That is correct.

Mr. Kolisch: I offer Plaintiff's Exhibit 60.

The Court: It is admitted.

(Chart of Mr. Davidson previously marked Plaintiff's Exhibit 60 for identification received in evidence.)

(Testimony of John H. Davidson.)

Mr. Kolisch: I am going to hand you a sheaf of papers and ask you if these are the work sheets from which you made your calculations in coming to the results which you showed on Plaintiff's Exhibits 59 and 60? I will ask that this be marked Plaintiff's Exhibit 61 for identification.

(Sheaf of papers above referred to marked Plaintiff's Exhibit 61 for identification.)

Q. (By Mr. Kolisch): Look at that sheaf of papers that I handed you and tell me briefly what they are.

A. These are my work sheets which I used to obtain the data which I presented on the chart.

Mr. Kolisch: I offer Plaintiff's Exhibit 61.

The Court: Admitted.

(Sheaf of papers previously marked Plaintiff's Exhibit 61 for identification received in evidence.)

Q. (By Mr. Kolisch): In your experience as a statistician, Mr. Davidson, do you know of any [155] more accurate manner of measuring a situation such as you were asked to apply to the methods you have employed in preparing these two charts?

A. No, I do not. I attempted to take in every case a conservative approach.

Q. In selecting your methods for plotting did you at any step exercise a choice between two or more standards or recognized methods of plotting the available data?

A. No, as I have stated previously, there was

(Testimony of John H. Davidson.)

only one method which I felt could be used, and that method did not permit of any judgment on my part. In other words, any competent statistician would come up with exactly the same data, the same results.

Mr. Kolisch: You may examine.

Cross Examination

Q. (By Mr. Dezendorf): Mr. Davidson, what figures did you have representing the volume of sales of Raimann machines in the first six months of 1952 from which to work?

A. Should I put the chart back so that we can look at that?

Q. Anything that would be more convenient for you in answering the question, yes.

A. Now, if you could repeat that question so that I can see just the times you meant?

Q. What figures did you have furnished to you representing the volume of sales of Raimann machines in the first six months of 1952? [156]

A. It is these figures right here. Would it be helpful if I read them off? These figures were supplied to me by Mr. Norman Workman.

Q. What was the dollar amount that you were given for the sales of Raimann machines for the first six months of 1952?

A. The dollar amount is a statistic which I did not compute. I merely computed number of machines.

Q. How many machines were you told had been sold the first six months of 1952?

(Testimony of John H. Davidson.)

A. I have not analyzed that separately, but I can quickly add them up right now.

Q. Will you do that, please?

A. In January there was none, nor February, 1952. March there was one; April there was two; May there was two; June there were five; July there was one, and that adds up to eleven.

Q. Did that represent the machine delivered or an order taken?

A. I was told that these were on a basis of orders taken but only orders which were later firmed up and confirmed as sales. In other words, these are sales, but the dates shown are the dates of the orders.

Q. So that you are saying that the machines that you have just computed were actually ordered [157] in the first six months of 1952; is that correct?

A. These eleven machines that I just added up were ordered in the first six months of 1952; that is correct.

Q. Were you told how many orders were cancelled in the first six months of 1952?

A. I had no knowledge of that.

Q. And if there had been a number of cancellations in that period, that would throw out of kilter the chart that you had made, wouldn't it?

A. No, sir, that would have no effect on the chart.

Q. Assuming that the machines that you show were orders above cancellation; right?

(Testimony of John H. Davidson.)

A. These are orders which were later confirmed by actual sales.

Q. You have no relation in your charts at all to dollar amounts of sales; is that correct, so far as the Raimann machine is concerned?

A. As far as the Raimann machine, there is no relationship to dollars.

Q. You do not propose to suggest what caused the fall off of Raimann sales subsequent to July, 1952, do you?

A. You are stating that there was a fall off of machines prior to July, 1952?

Mr. Dezendorf: No, will you read the question, Mr. Griffith? [158]

(Last question read.)

The Witness: I was told that there was a letter sent. I have not seen the letter, but, as a statistician, I feel that certainly something happened.

Q. (By Mr. Dezendorf): Yes, but you do not know what it was?

A. No, I do not other than being told that there was a letter. I have not seen the letter.

Q. You have not taken into account in any way in any of your projections on those charts what the market conditions were in the plywood industry, have you?

A. I tried to indicate with the other two lines what the actual condition of the plywood industry was as far as the production and new plants being built.

(Testimony of John H. Davidson.)

Q. But not the profit or the price of the product?

A. No, I have not analyzed that on this, sir.

Q. So that they might have been producing an awful lot and losing money on it so far as you are concerned?

A. I have not analyzed that on this chart. I have noticed in the Timberman Magazine in its annual reviews during this time——

Q. But you did not take them into account economic-wise in making your charts, did you?

A. I found nothing to indicate over a long period of time that the productive capacity or the [159] production represented in our situation was other than the actual situation.

Q. Yes, but it has no relation to the economic situation, does it?

A. I did not find that the economic situation was unrelated to these two other lines which I have computed.

Q. Isn't it a fact, Mr. Davidson, that there was a break, a severe break in the price of plywood in December of 1951?

A. That was beyond the scope of my study.

Q. Wasn't that reported in the Timberman that you say you examined?

A. I do recall that there was a section in the Timberman which related to price structure. In my examination of the Timberman I looked at the summary amounts, the summary statements they made, which indicated in every case that the ply-

(Testimony of John H. Davidson.)

wood industry was over-all in a better state than the previous year.

Q. But you disregarded completely the information in there with respect to a break in the plywood price; is that correct?

A. I felt that that was beyond the scope of my study.

Q. Now, did you remember in looking over the Timberman that there were three price breaks in 1952; one in the spring, one in the summer, and a big one in the fall?

Mr. Kolisch: Now, your Honor, the witness has testified he does not know anything about price breaks.

The Court: We will just assume he did not take [160] those things into consideration. He has already told us he did not.

Q. (By Mr. Dezendorf): In making your projection with respect to the sales of Raimann machines you have assumed, have you not, that an unlimited number of Raimann machines could be sold?

A. In making my projection I must say that this differs from most projections inasmuch as I had hindsight. I only used data taken from actual records. I did not assume that an unlimited number of machines could be sold because that wasn't —that didn't enter into this calculation.

Q. However, you are unable to state that any of the so-called 78 machines which you say they

(Testimony of John H. Davidson.)

lost sales on were not actually sold in 1953, 1954, or 1955, are you?

A. My analysis is merely on the basis of what actually occurred, and I don't know that anyone could state which machine would have sold when I was on such a basis.

Q. When you say that they lost the sale of the 78 machines, you do not mean to infer that a customer might have made that purchase and bought a competitive machine, thus eliminating any possibility of Prentice——

Mr. Kolisch: This witness has not testified concerning the customers. He did not know anything about that. I do not think it is proper cross-examination.

The Court: He is just limiting the reach of the testimony. [161] I think you do not have to do that. I have been following myself.

Q. (By Mr. Dezendorf): Isn't it a fact, Mr. Davidson, that commencing particularly in the year 1952 an increasing amount of the total production of soft-wood plywood was comprised of sheathing?

A. I have no knowledge of that matter. I have merely analyzed the available statistical material.

Q. You do not know whether Raimann machines are used in the industry in sheathing mills or not, I take it? A. I do not.

Q. It is my understanding that your line D on the chart that is there before you includes British Columbia and Alaska; is that correct?

A. That is correct.

(Testimony of John H. Davidson.)

Q. Are you aware of the fact that there has been a tremendous increase in the amount and number of mills in British Columbia and Alaska since 1952?

A. These lines reflect that increase.

Q. Does your red line at the bottom with respect to Raimann machine sales contemplate sales to Alaska and British Columbia?

A. These red lines, from my standpoint, do not contemplate sales to any particular area. They merely represent my appraisal of what actually happened.

Q. Will you refer back to that chart that is [162] now covered up for a moment.

(Chart produced.)

Q. Starting from your left on the black line, that starts when?

A. That starts with September, 1948.

Q. What is the peak of the first high line; what is the date of that?

A. Are you referring to this line? (Indicating on chart.)

Q. Right. What is the date of that?

A. That is March of 1949.

Q. Where is it by a month that the black line hits the bottom again after that?

A. Are you referring to this point? (Indicating on chart.)

Q. Right. What is the date?

A. That is May, 1949.

(Testimony of John H. Davidson.)

Q. How long does it stay along the bottom there?

A. It stays until October, 1949, which is——

Q. Do you know that that period that you have just referred to occurred during a break in the market, a slump in the plywood industry?

The Court: He does not know that. That is the same type of question that was asked to which objection has previously been made. You will be able to bring that out yourself.

Q. (By Mr. Dezendorf): In making your projection of what you thought the Prentice Machinery Company should have done [163] after July of 1952, you did not take into account the experience of other persons in the same business as the Prentices to see how their figures were, did you?

A. As I stated before, I computed this line in exactly the same manner as before, taking a conservative approach to the actual conditions as were measured.

Q. Relating only to the Prentices' experience and not anyone else; is that correct?

A. That line relates only to the Prentice experience; that is correct.

The Court: I notice in Exhibit 59 you do not use a dollar volume for Raimann patchers, but you use a dollar volume in Exhibit 60 for items other than the Raimann patcher.

The Witness: That is correct.

The Court: Each one of these squares repre-

(Testimony of John H. Davidson.)

sents the amount of business done during a particular month?

The Witness: Yes, you are referring to these squares? (Indicating.)

The Court: Exhibit 60, yes.

The Witness: Yes, for instance, the point that was brought up right here represents sixty thousand, slightly over sixty thousand dollars business was done on that date which is March of 1949. That is the end of March, 1949.

The Court: In other words, they did not do any business or practically none in January and February. They did quite a bit in March. [164]

The Witness: That is correct.

The Court: And absolutely none during the balance of the year, 1949, from June to December, no business whatsoever except in November and December they did a few hundred dollars worth of business?

The Witness: November was a very slight amount, yes. The exact figures are given in my work-sheet computations.

The Court: I have those right here. In 1948 for the last three months they did seventy-eight thousand dollars total business, and for the full year of 1949 they did only forty-nine thousand dollars worth of business, even including the Raimann patchers, but that was the time before they had the patchers. Yet, on your trend you show a constantly rising trend even though 1949 was a very poor year. Is that right?

(Testimony of John H. Davidson.)

The Witness: That is right because I used a straight line to analyze the long term because the matters I was worried about to taking too small a sample and getting higher seasonal fluctuations. I was reluctant to divide it into small sections and run it up and down.

The Court: In 1950 the increase of business was up to two hundred seventy-three thousand dollars, and for the year 1951 almost a million dollars, nine hundred forty-six. Those two amounts would naturally control the straight line or the curve, wouldn't they, for the previous years and also for the subsequent years? [165]

The Witness: The reason I used the method of least squares is that every single value has to be taken into account. In the computation, as you see by my work sheets, I multiply out each single number. The low ones contribute as well as the high ones.

The Court: If in fact in 1949 and 1948 the business—well, figure in 1949—had continued as it had in the last three months of 1948, the curve would have been a great deal different; would it not?

The Witness: I would hesitate in making any trend based on three months.

The Court: I mean over the period of ten years, figured on the basis of ten years, your 1949 experience had a great effect upon the normal curve, didn't it?

(Testimony of John H. Davidson.)

The Witness: You mean this period here? (Indicating on chart.)

The Court: Yes.

The Witness: Had a great effect? My computation——

The Court: On the subsequent years.

The Witness: The reason I used this method of least squares is so that it was completely taken out of my judgment. I merely used every single number in there to get the only lines which would measure the long-term trend.

The Court: Disregarding your own personal judgment? [166]

The Witness: Yes.

The Court: But what would the result have been had the trend in 1948 continued for 1949?

The Witness: You mean if these—we have data for four months in 1948.

The Court: Yes.

The Witness: Only one of which there were any explanation. If we had extrapolated on that portion, it appears that the line would possibly have been something like that, and then if we would go on the early part for the first four months of 1949, we would have a line like that, and then we would have a line down and up and down.

The Court: My point was just this. See if I am correct; that a comparatively small amount of sales during the earlier years on a constantly rising scale will show a curve much higher than is shown right there due to the fact that there was a loss

(Testimony of John H. Davidson.)

of business during the year 1949. Is that right?

The Witness: Your question is that this amount here had an undue influence over the——

The Court: Projection, yes.

The Witness: Well, I would be reluctant to state it that way because I used every single figure that was given me in making the computation.

The Court: Your projection of the actual sales based upon the sales prior to July-August, 1952, [167] would indicate that on machinery other than the Raimann patcher the company now should be doing about eighty-five thousand dollars a month; is that right?

The Witness: That is correct. As a matter of fact, all records were broken early in 1955 when they did over one hundred twenty thousand dollars worth.

The Court: They have already done one hundred twenty thousand dollars worth?

The Witness: Yes, my chart shows that in March of 1955 they did, just approximating from the chart, about one hundred twenty-three thousand dollars worth of business.

The Court: Yes, but that was only for one month. I am talking about the normal curve.

The Witness: That is correct, that one month was a very high peak.

The Court: You think that you can take that curve and extend it on practically indefinitely?

The Witness: No, sir, I do not. In all cases here, as I have stated, I have had the value of

(Testimony of John H. Davidson.)

hindsight. I have not had to stand at some indeterminate point and say that is what is going to happen. I have stood here and measured. The actual rise of my curve stops right here as of now (indicating on chart). I make no forecast for the future. May I bring up one point that might show a little more light on this line? [168]

Mr. Kolisch: What is this line?

The Witness: This line is F-2 which is a trend line computed on actual sales. That line shows, and I think it is better illustrated in the other chart but in either chart it—in computing the actual rate of what the increase in dollars is per month for today we have lumped in, I have lumped in all the bad months with the good months.

The Court: You show that in the latter part of 1952 on machinery sales other than the Raimann patchers that the business went down to practically nothing?

The Witness: That is correct.

The Court: Did you take into consideration commission sales during that period?

The Witness: I received these figures from Mr. Workman and refer you to him.

The Court: Did you make that calculation or computation, or did someone on page 7 of the deposition?

Mr. Kolisch: You mean of Mr. Maginnis' deposition?

The Court: Yes.

(Testimony of John H. Davidson.)

Mr. Kolisch: Yes, your Honor, here it is (producing document).

The Court: What are one of these small squares below the figure 10? Does 10 mean ten thousand dollars?

The Witness: Which chart are you referring to now, sir? [169]

The Court: Exhibit 60.

The Witness: You are referring to these small figures or these small blocks?

The Court: What is each large block, fifty thousand?

The Witness: Well, from this point to this point is ten thousand, and each one of these represents an additional ten thousand. Then this heavy dark line here represents one hundred thousand, and there is also a heavy dark line at fifty thousand.

The Court: Look at your chart and tell me approximately how much business they did in September, 1952.

The Witness: September, 1952, that would be about six thousand.

The Court: Six thousand dollars?

The Witness: Yes.

The Court: Actually, the amount of business was thirty-eight thousand plus five thousand dollars commissions?

The Witness: This is based on the data given to me by Mr. Workman.

Mr. Kolisch: Your Honor, there may be a discrepancy. The chart happens to show the month in

(Testimony of John H. Davidson.)

which the sales were actually made, invoiced out, not orders taken. This is invoiced out.

The Court: I have just looked at this 52 which indicates [170] practically no business on it, and I notice from this chart that except for the months of January and February the latter part of the year was practically as good as the early part of the year.

Mr. Kolisch: Mr. Workman tells me that I was confused. The chart got information on order dates. This is actual sales. It is just the other way around. I had it turned. This is order date, when the machinery was ordered, but when we prepared these charts we were looking at orders and when did they get orders, the same for the Raimann and the same thing for the other machinery.

The Court: You mean they got practically no orders during the latter part of 1952?

Mr. Kolisch: We did it that way, of course, because we considered it the most relevant data.

The Court: I think so too. I just wanted to find out what the facts are. Didn't Prentice maintain a shop where they sold a considerable amount of things and repairs, small items and repairs?

The Witness: I understand they do have. Well, they have the sales company and the machine works.

The Court: That went through a different company, is that right?

The Witness: On this chart we have kept separately data from the machine works and the sales company. [171]

(Testimony of John H. Davidson.)

Mr. Kolisch: Your Honor, this is just machinery; no parts, no spare parts or anything is shown on these charts.

The Court: Proceed.

Mr. Kolisch: No further questions. Mr. Nikoloric is going to examine Mr. Bloch. Is that all right?

The Court: Very well.

(Witness excused.) [172]

IVAN BLOCH

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Nikoloric): What is your age and occupation, Mr. Bloch?

A. I am 50, and I am an industrial consultant and owner of Ivan Bloch and Associates.

Q. What experience do you have in the field of statistics?

A. As part of my business operations and in my professional work during the past 25-or-so odd years, I have had to employ statistical methods quite frequently.

Q. What formal educational qualifications do you have in the field of statistics, briefly?

A. As part of my regular engineering courses leading to an electrical engineer's degree, I have had to take courses with statistical methods and procedures.

(Testimony of Ivan Bloch.)

The Court: You do not hold yourself out as a statistician though, do you?

The Witness: No, your Honor, I do not.

Mr. Nikoloric: Q. Is that why you hired Mr. Davidson? A. That is correct, yes.

Q. He is the expert in your organization who operates subject to your review?

A. That is correct. [173]

Q. You were here present during the testimony of Mr. Davidson; were you not?

A. Yes, sir.

Q. You are familiar with these two charts, Exhibits 59 and 60? A. Yes, sir.

Q. Did you supervise their preparation in the sense that you consulted with Mr. Davidson and so forth? A. That is right.

Q. Mr. Bloch, let me ask you this question. Are there any figures available concerning the condition of the business of selling plywood equipment and machinery during the period of time covered by these charts, either from the Federal Reserve Board or elsewhere? A. No, sir.

Q. In order to determine statistically or as a matter of business analysis, what factors would you have to take into consideration to get the most accurate estimate of what the conditions were in this business over this period of time?

A. I think, sir, that the condition of the plywood industry with reference to installed capacity would be the most pertinent factor to examine.

Q. In other words, if the capacity was going up

(Testimony of Ivan Bloch.)

somebody had to be selling machinery; is that correct? A. That is right. [174]

Q. Is there any other statistical method or method of business analysis that you know whereby you could determine accurately what the condition of this business must have been during that period of time?

A. No, sir, that, to the best of my knowledge, is the only method available.

Q. Would the experience of any one or any two people in this business be useful to you in determining this matter? A. Not necessarily.

Mr. Nikoloric: That is all, Mr. Bloch.

Cross Examination

Q. (By Mr. Dezendorf): Do you know how many persons there are directly competing with Prentice in the type of machinery that they handle?

A. No, I do not.

Q. You have not any idea on it, have you?

A. No, sir, I have none.

Q. You do not know whether it is two or three?

A. I have no idea.

Q. You did not try to find out what the experience of Prentices' competitors was during this critical period, did you?

A. We wrote some letters to a number of manufacturers to get some idea as to what the capital investment in this industry, the plywood industry, manufacturing equipment, had [175] been. We received no replies.

(Testimony of Ivan Bloch.)

Q. Did you familiarize yourself with the various price breaks that had occurred in the plywood industry to see whether there was any relation between those breaks prior to July, 1952, and Prentices' orders? A. No, we did not.

Q. You do not know then what effect prior price drops prior to July, 1952, had on the Prentice business? A. No, sir.

Mr. Dezendorf: No further questions.

Redirect Examination

Q. (By Mr. Nikoloric): Mr. Bloch, what has price got to do with it, the price of plywood?

A. It is my belief that in an industry of the magnitude of the plywood industry that what might be termed momentary changes in price patterns or sales patterns in effect have no real effect upon the long-term trend of the industry no more than it does if it was in any other type of industry; that prudent management, of course, takes cognizance of the swings whatever way they may occur, but that where prudent management looks to is the long-term outlook for the industry, whether or not expansion is necessary in its productive capacity to meet — or restrictions in productive capacity, to meet whatever the market demands may be. I do not think [176] that price fluctuations are of critical importance especially when those occur on a momentary-break basis.

Q. In other words, is it your testimony that what you look to see is whether the capacity to pro-

(Testimony of Ivan Bloch.)

duce plywood in the industry kept expanding; is that correct? A. That is right.

Q. That in your opinion is a key factor?

A. That is.

Mr. Nikoloric: No more questions.

Recross Examination

Q. (By Mr. Dezendorf): Mr. Bloch, you know it to be a fact, don't you, that the sales of Prentice Brothers fell off in the second quarter of 1952, which was the quarter prior to July of 1952?

A. The only information I have, Mr. Dezendorf, is that which was furnished by Mr. Workman and his group which have been charted on this particular series of charts. What factors covered these fluctuations, we have no knowledge.

The Court: Mr. Bloch has already testified that he only considered the long trend, not anything that would happen in a month or two months or six months.

Mr. Dezendorf: I would still like to get an answer to my question, if I may, if the Court please.

The Court: Proceed.

Mr. Dezendorf: Q. Did you know, Mr. Bloch, that the sales of the Prentice Brothers fell off in the second quarter [177] of 1952?

A. Mr. Dezendorf, whatever the chart shows it shows.

Mr. Kolisch: Mr. Bloch has testified to that.

The Court: You know it from looking at the charts, don't you?

(Testimony of Ivan Bloch.)

The Witness: Correct.

Mr. Dezendorf: That is all.

The Court: Mr. Bloch, you also know that in November of 1952 there was a National election of quite some consequence, don't you?

The Witness: I heard of it, your Honor.

The Court: Did you attribute any increase or decrease of business to the election campaign?

The Witness: That is a difficult question to answer, your Honor. I believe that the Country was looking up, let's put it that way.

The Court: Wasn't there a sharp increase in the amount of orders placed immediately after the election, particularly in January, 1953?

The Witness: My recollection is that there was a fairly substantial increase in business, but I do not recall whether or not it particularly was marked in the plywood industry. As a matter of fact, judging from the other chart, the trend was a continual upward one with minor upswings and downswings.

The Court: That is all.

Mr. Kolisch: We have no further questions.

Mr. Nikoloric: Thank you, Mr. Bloch.

(Witness excused.)

Mr. Kolisch: This concludes plaintiff's case in chief. I would like to make sure we get all our exhibits in, your Honor, before we sit down.

The Court: All the exhibits offered by the plaintiff are admitted.

Mr. Kolisch: Well, your Honor, I would like to

call your attention to two exhibits which I have added on here.

The Court: Go ahead.

Mr. Kolisch: One is a certified copy of a judgment in the prior Prentice case and a certified copy of your opinion of April 17th.

The Court: They are admitted.

(Certified copy of judgment and certified copy of Court's opinion above referred to were thereupon admitted in evidence.)

The Court: Are you offering all of the exhibits?

Mr. Kolisch: I am offering all of the exhibits on a sheet entitled "Plaintiff's Exhibits."

The Court: They may be admitted.

(Thereupon, Plaintiff's Exhibits 1 through 48, 50 through 61, 70 through 88, more particularly described in a detailed list entitled "Plaintiff's [179] Exhibits," were received in evidence.)

(Discussion off the record.)

Mr. Dezendorf: If the Court please, at this time defendant moves the Court for a directed verdict and for judgment in its favor and against the plaintiff for the reason and upon the grounds that no competent relevant proof of damage has been made or received and that there is no evidence in the record from which an award in favor of plaintiff and against defendant can be made.

The Court: I will take it under advisement. Call your first witness. I am going to deny that motion, and you can renew your motion at the end of the case—or you will not need to.

Mr. Dezendorf: Mr. Charles Prentice is not here?

Mr. Kolisch: That is correct.

Mr. Dezendorf: Call Mr. David Prentice. [180]

DAVID PRENTICE

called as an adverse party in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dezendorf): Mr. Prentice, did you start out right in the early part of 1950 when your company had the opportunity to sell Raimann machines trying to sell them yourself?

A. 1950, yes, I did.

Q. Did you keep on trying to sell Raimann machines all the way along?

A. Yes, I have always attempted to sell them.

Q. Were all of the brothers trying to sell Raimann machines, or was it limited to one or two or more?

A. I believe the whole company was engaged in trying to sell them.

Q. Now, taking you back to the fall of 1951, can you put yourself back in that period and remember the die trouble that you were having at that time on Raimann machines?

A. It is kind of hard to put it back at any one place. I can remember back there.

Q. Isn't it a fact that in the fall of 1951 you

(Testimony of David Prentice.)

were having just an extreme difficulty with the dies and their breaking?

A. No, sir, it is not a fact that we were having extreme difficulty. We were having difficulty with the dies, but I [181] do not like your choice of the word "trouble."

The Court: Or the word "extreme."

The Witness: Or the word "extreme," because that is not the case.

Mr. Dezendorf: Will you hand the witness Exhibit 162, please?

(Exhibit referred to presented to the witness.)

Mr. Dezendorf: Q. That is 5-B, 3-C of the old numbers.

Do you recognize that letter of September 20, 1951, which you wrote to the Raimann factory?

A. I recognize the letter; yes, sir.

Q. Did you not state in that letter in the first sentence: "Within the last week, we have had a great deal of trouble with the chipped dies. Die No. A is chipping out with a chip almost a quarter of an inch wide and a quarter of an inch deep. In the last two weeks, we have had five Number 19 dies and three Number 7 dies chip in the identical spot, which is on the left-hand side of the point, looking at the profile."

Is that right?

A. That is what it says here; yes, sir.

Q. That was true, wasn't it?

(Testimony of David Prentice.)

A. Do you mean did we have five dies that chipped out? [182]

Q. Is what is said there in that letter true?

A. Yes, we had the dies chip out.

Q. And you had a great deal of trouble with them, didn't you?

A. That is the way I expressed it to Mr. Becker.

Q. Don't you think that was the fact?

A. There we get back to the use of words again. We were having extreme trouble with those particular sets of dies, but that didn't represent all the dies we had out that were doing good work and were not chipped.

Q. Isn't it a fact that every customer of yours who had a machine in 1951 had die trouble?

A. I don't think I would say every customer; no, sir.

Q. 95 per cent did, didn't they?

A. I don't think I would say that much.

Q. 75 per cent did?

A. I would much rather go over the list. It would help me a lot, but I don't think it was anywheres near that high a figure.

Mr. Dezendorf: Will you hand the witness Exhibit 163. That is the next one after the one we just mentioned, 4-C.

(Exhibit presented to the witness.)

Q. Did you write that letter, Mr. Prentice?

A. Is this in two pages or——?

Q. It is, it is in two pages. Did you write that

(Testimony of David Prentice.)

letter [183] of October 1, 1951, to the Raimann factory? A. Yes, sir, I probably did.

Mr. Nikoloric: Your Honor, he does not have to describe that question any more. All the exhibits in here were signed by him. He wrote them.

Mr. Dezendorf: Q. Is the third paragraph as follows: "We are returning to you one set of chipped dies, which I would appreciate your analyzing to find out what is wrong with them. I wrote you earlier on these dies, explaining that seven sets have chipped, all in the identical same spot."

Jumping now to the fifth paragraph:

"At the same time, we feel something must have been wrong with the dies, being as they have all chipped in the identical same spot, which is right on the end on the left-hand side as you are facing the profile number. We are anxiously awaiting the new dies, or die, that is being shipped with the next consignment of machines, in order that we can give it a try on our fir veneers."

Is that in the letter?

A. Yes, sir.

Q. Did you write it? [184]

A. Yes, sir; I did.

Q. Now, going to the second page:

"Please bear witness and remember that dies are something new to all of us, and we will need an awful lot of education and help, in order that the patchers may continue to be of value here on the Coast."

Did you write that?

(Testimony of David Prentice.)

A. Yes, I did.

Q. Isn't it a fact that your trouble you were having with the dies was jeopardizing your whole Raimann plan of selling Raimann machines?

A. Well, the machines continued working good. I don't care what it is. I would like to explain right now that probably other letters in here pertaining to the same thing of this what was to me a problem of these dies chipping out, and, as it turned out, we eventually found out what the trouble was, and it was not with the dies at all. Probably, if you want to find that letter, that is in there, but we did find the trouble and corrected it in this particular aspect of what you consider die trouble.

As it turned out, it was not the die's fault. It was a part in the machine that became worn out and allowed the defect ejector to move around there, and once we found the correction for that we eliminated a great deal of the [185] problem, well, all of the problem to that extent.

Q. You did not find the trouble until mid-1953, did you?

A. No, sir, I think we found the trouble much sooner than that.

Q. I am certain that you did not, from your correspondence, unless you have reference to a letter that I have not seen.

A. I don't know, I have got a lot of letters, and there are a lot of letters you do not have in this batch.

Q. At some time and specifically in January of

(Testimony of David Prentice.)

1952 you were having trouble also with your Victor clippers; were you not?

A. I don't think we have put a machine in yet that we have not had troubles with, if you want to use that word, and still have them today.

Q. Your troubles with the Victor clipper were pretty extreme in January of 1952, weren't they?

A. I don't think they were any more extreme then than they are now.

Q. Do you mean you still have them sent back to you and money demanded for the return of them?

A. Are you undoubtedly implying the Albany Veneer Company sent a clipper back?

Q. That is right, and demanding their money and giving you eleven reasons why it was not any good?

A. Yes, sir, in that particular case the company had no [186] need for the clipper. They are operating today without a clipper because a clipper just does not fit into their operation with the back-roll lathe, and that particular clipper that had eleven reasons why it was no good was sold right after this transaction to Georgia-Pacific Plywood, their Springfield operation, and is still operating satisfactorily for them.

Q. Isn't it a fact, Mr. Prentice, that in January of 1952 the market for plywood was depressed, as a result of which several of the new small mills went under?

A. Mr. Dezendorf, to be honest with you, I don't know of any small mill or any plywood plant that

(Testimony of David Prentice.)

has actually gone under. I think every one that has ever been started is operating today.

Q. They had heavy financial problems for a while, didn't they, in January, 1952?

A. Well, I know a couple right now that are still having financial trouble.

Q. But the point I'm trying to make is that you know, do you not, that in January of 1952 several of the new small mills were in extreme financial difficulty because of the condition of the market?

A. I don't think that would be true necessarily, not in my estimation it wouldn't.

Q. You do not remember then the correspondence that you [187] received in January of 1952, I take it?

A. If you are referring to Centralia or Sylvan Products there, I happen to know some of the people that went up there. That plant under better management is, I understand, today a very successful plant.

Q. My point is in January of 1952 they were in extreme financial difficulty, were they not, because of the market conditions?

A. I assume that they were, not because of the market conditions, but just the same some plants are in difficulty today when other plants are making more money than they ever did before.

Mr. Dezendorf: I ask that Exhibit 167 be handed to the witness.

The Court: Is that a letter which he wrote?

(Testimony of David Prentice.)

Mr. Dezendorf: It is a letter which he received from Jackson Industries, to which is attached a copy of letter from Sylvan Products in which they explain the difficulties therein because of the plywood market.

The Court: Really, I am not interested in those letters nor the fact that on occasions these dies have broken. I understand that testimony. I have read the letters. I think the witness has satisfactorily explained that, that these machines came equipped with a number of dies some of which did not hold up and some of which were apparently giving [188] satisfactory service and that new dies were developed to take care of Grade A sheets.

I have been trying to find out from the beginning of this case what the business done during the critical period was, and I am also interested now that these charts have come in in how were the others coming in. Did they get orders during the months of September and October and November on machinery other than the Raimann patchers?

Mr. Nikoloric: Your Honor, that is all charted there on Exhibit 60.

The Court: You have finished your case. Now let them put on their case.

Mr. Nikoloric: I am sorry. I thought you were talking to us.

The Court: I know what that shows. I am not interested so much in what business was done in 1954-55. I want to know what was done in the last part of 1952 and why they were not doing business

(Testimony of David Prentice.)

in March and April and May of 1952 before the letter came, and how much business they did immediately after.

I might say that in looking at some of the letters that they received from their customers they had all the friendship that they had after they got the letter from Smith and Tuck that they had before, and these people were buying things. I want to know the amount that they purchased, and [189] I am not interested so much about having troubles. Every company has troubles. They had troubles before and are having troubles now, and I believe it, but let's see what happened in the business during that period.

Of course, if one of the big machines was given back and several machines with these machines costing thirty or forty thousand dollars, that is quite a jolt, and we ought to know that, but I think we have had too much talk here and not enough figures and figures of actual business, not projections. I have looked at that, and I will come to my own conclusion, that I want figures upon which the projections may be made. Now that I have told you what I would like to find out, go ahead, and perhaps we can get down to business again.

Mr. Dezendorf: I hope the Court has in mind that the main point that we wish to make in the case is that not only had their business in 1952 fallen off in the early spring of 1952 before anything happened, but there were a number of cancellations of orders in March and April.

(Testimony of David Prentice.)

The Court: That is what I want to know about. That is what I want to know.

Mr. Dezendorf: Q. Mr. Prentice, isn't it a fact that you had a number of cancellation of orders for Raimann veneer-patching machines prior to May 1, 1952?

The Witness: No, sir, that is not a fact. [190]

Q. Did you ever have a cancellation of a Raimann order in the first six months of 1952?

A. I am pretty sure we never received a cancellation of an order.

Q. You are sure of that, are you?

A. Yes, sir, I am.

Q. Are you familiar with a letter that the Controller of your company wrote to the Raimann Company? A. Yes, sir, I am.

Q. On March 24, 1952?

A. May I see the letter?

Q. Just a minute. I will get the number for you. It is 149. Do you have before you Exhibit 149, Mr. Prentice? A. Yes, I do.

Q. Is that a letter dated March 24, 1952, addressed to the Raimann people by Norman K. Raymond, Controller for E. V. Prentice Company?

A. Yes, sir, it is.

Q. Let me read the second paragraph of that letter:

"We are writing at this time to advise that we wish to have you hold up all shipments of machines after the April 17th shipment as our plywood market is very soft here and we have had numerous

(Testimony of David Prentice.)

cancellations of orders for these machines." [191]

Is that a correct statement?

A. That is what it says there; yes, sir.

Q. That was the fact at that time; was it not?

A. That we had had numerous cancellations for orders of these machines, that is not a correct statement; no, sir.

Q. You knew that this letter went to the factory, didn't you?

A. Yes, sir, I—it was written—this portion of it was written at my request.

Q. So that you are the one responsible for the statement that the plywood market was soft and that you had had numerous cancellations of orders for machines; is that correct?

A. Yes, I was responsible for that complete statement.

Q. You say now that that was an untrue statement at the time; is that correct?

A. That is correct. It was an untrue statement.

Q. But the fact remains that you did cancel out the order that you then had for 37 machines to come, didn't you?

A. We told them to hold up on shipment of them.

Q. And that you would let them know—well, we can read the exact text:

"As it stands now, we have nine machines en route at present and with shipment April 17th of an additional eight [192] machines we will end up

(Testimony of David Prentice.)

with eleven machines in stock on the basis of present firm orders."

Was that a true statement?

A. I doubt it. I think we probably had more firm orders than what I had him imply in this letter.

Q. And yet you were responsible for the writing of this letter to the factory; is that right?

The Court: He has already said so. Let us go to something else.

Mr. Dezendorf: Q. And the last statement:

"For that reason we do not want any further deliveries of machines beyond the April 17th shipment until we notify you."

That is what you said, isn't it?

A. That is correct.

Q. You knew that that statement went to the factory? A. Yes, sir.

Q. Now, you did not order any more machines from the factory after March 24, 1952, until the spring of 1953?

A. Well, I wouldn't know that.

Q. I assume you are also familiar with a letter which Mr. Raymond wrote on January 20, 1953, which is Exhibit 131. Do you have 131 before you? [193] A. Yes, I do.

Q. Was that a letter that Mr. Raymond wrote to the Raimann factory on January 20, 1953?

A. This is a letter of Mr. Raymond's, yes.

Q. You were familiar with it; were you not?

A. I am not familiar with this one; no, sir.

(Testimony of David Prentice.)

Q. You never did know about that one?

A. If you will let me read it here (reading document). Oh, I assume that I would be familiar with this letter.

Q. All right, you were familiar with it then at the time it went out?

A. I would say that, that I probably would be, yes.

Q. So that by this letter dated January 20, 1953, your concern cancelled with the factory an order for 37 machines which you had told them to hold up in your letter of March 24, 1952; is that correct?

A. No, sir, this letter says, "On January 9, 1953, we wrote you regarding the Number 5 dies that were returned to you——"

Q. You have got the wrong letter. It is 131.

The Court: Let us take up the correct letter at two o'clock.

(Noon recess taken.) [194]

Afternoon Session, 2:00 p.m., Trial Resumed

The Court: You may proceed.

JAMES B. CONWAY

a witness, produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dezendorf): Mr. Conway, where do you reside? A. Our offices?

Q. Yes.

A. 1623 Southeast [illegible]xth here in town.

(Testimony of James B. Conway.)

Q. You live here in Portland? A. Yes.

Q. What business are you engaged in, Mr. Conway?

A. We are manufacturers' representative.

Q. What company do you represent?

A. Our basic concern is the Coe Manufacturing Company.

Q. What type of machinery does Coe Manufacturing Company manufacture?

A. Veneer and plywood machinery.

Q. Are you familiar with the E. V. Prentice Company? A. Yes.

Q. Do they handle the same type of equipment and machinery that Coe Manufacturing Company manufactures?

A. They have several basic machines that are in direct [195] competition with ours.

Q. At my request, Mr. Conway, have you broken down by quarters for the years 1950, 1951, 1952, 1953, 1954, and 1955 the sales which your concern made to the plywood industry in this area?

A. We have.

Q. Will you produce that set of figures, please?

(Documents produced.)

Q. May I have that marked.

(Document, sheet of typewritten figures above referred to, marked Defendant's Exhibit 214 for identification.)

Mr. Dezendorf: Q. Does Exhibit 214 show the sales which your concern made in this area to the plywood industry during the years that I men-

(Testimony of James B. Conway.)

tioned, on a quarterly basis? A. Yes.

Q. How long have you been connected with the Coe Manufacturing Company, Mr. Conway?

A. Our firm is a partnership, and I have been with them about ten years, and my dad has represented them about 30 years.

Q. Are you familiar with the increase in production, if any, in sheathing? A. Yes. [196]

Q. When did that large increase in the sheathing production start?

A. Oh, I would say within the past couple of years.

Q. What effect, if any, has the sheathing production had upon the over-all increase in plywood manufacture in the last two years?

A. Well, I think that mills producing sheathing have increased substantially over any other mills. I think there has been more increase in the particular sheathing plywood grades than any others.

Q. Are you familiar with the automatically-veneer-patching machines?

A. Well, to some extent, although we do not basically handle the patcher.

Q. Are automatically patching machines used in the production of sheathing?

A. Only in the very high grades; not in the low grades.

Q. Well, sheathing itself is a low-grade plywood; is it not? A. Yes, it is.

Q. Mr. Conway, in your experience has there ever been any correlation between the sales of heavy

(Testimony of James B. Conway.)

plywood manufacturing equipment and the status of the price of plywood?

A. Well, it is almost a direct proportion. As the price of plywood does down, why, our sales substantially fall. [197]

Q. That has been your experience throughout the time you have been with your partnership; is that correct?

A. Yes, that is correct, when the price of plywood is very low we have very little business.

Mr. Dezendorf: You may cross examine.

Mr. Kolisch: I have not seen this exhibit.

The Court: It has not been offered either.

Mr. Dezendorf: I will offer it then.

Mr. Kolisch: May we have a short recess?

(Discussion off the record.)

Mr. Dezendorf: May we have this marked as 215, please?

(Document, "Dollar Value of Equipment Leased—Elliott Bay Plywood Machines Company," marked Defendant's Exhibit 215 for identification.)

The Court: Is there any objection to 214?

Mr. Nikoloric: There is no objection, your Honor.

The Court: It may be admitted.

(Document previously marked Defendant's Exhibit 214 for identification was thereupon received in evidence.)

The Court: Is there any cross examination?

Mr. Kolisch: Yes, there is, your Honor.

(Testimony of James B. Conway.)

The Court: Proceed. [198]

Cross Examination

Q. (By Mr. Kolisch): These figures which you have on Defendant's Exhibit 214, is this for A. M. Conway and Sons? Are you talking about the Coe Manufacturing or what do these figures represent?

A. That is our sales volume of those years.

Q. Who is "our"? Who are you talking about?

A. Our partnership.

Q. A. M. Conway? A. Yes.

Q. These figures as you have them broken down in quarters represent sales or orders?

A. Those represent sales during those periods.

Q. What is the lag usually between sales and orders?

A. Well, when we make a sale, I mean, it is a certified contract.

Q. I understand that. How long before you make—you have an order and then before you actually—I take it this means when you invoice it out, the sale, isn't it?

A. No, those figures are as our contracts are sent in to the factory.

The Court: Those are orders then?

Mr. Kolisch: Q. Those are orders?

A. Yes. [199]

Q. This is when the machinery is delivered?

A. Oh, no.

Q. This is as you sign up the customer on the order? A. That is correct.

(Testimony of James B. Conway.)

Q. Looking at 1952, I see that you progressively went up in your orders for each quarter, the first, the second, and the third, and then in the fourth quarter fell down to forty-nine thousand dollars from three hundred nineteen thousand in the third quarter? A. Yes, that is correct.

Q. Why did your business fall off so sharply in the fourth quarter?

A. Well, that's a little long for me to remember; however, as I recall it, at that time, why, that was when lumber came, I think the price of quarter-inch dropped to seventy-two dollars and a half or something.

Q. This had to do with the falling off of the price of what, plywood? A. Yes.

Q. I notice that in the first quarter of 1953 your sales were back up to one hundred nine thousand dollars? A. Yes.

Q. And they continued going up again into the second quarter? A. That is correct.

Q. You testified there is a direct correlation between the [200] sale of your machinery and the price of plywood? A. That is correct.

Q. Is that correct? A. Yes.

Q. Is there any such correlation between the sale of your machinery and the production of plywood?

A. I don't quite understand your question there.

Q. Do you know what I mean by the production of plywood? A. Oh, yes.

Q. Well, what trouble are you having then?

A. Well, as the industry increases and more

(Testimony of James B. Conway.)

mills produce, why, there is a good deal of tendency on the part of some of the people figuring on machinery to wonder if the plywood industry won't become overcrowded, something of that nature.

Q. The kind of machinery you sell, of course, has to do with the production of plywood, doesn't it? A. That is absolutely right.

Q. The more machinery you sell the more production you are going to have?

A. That is right.

Q. Is there any correlation between the sales of your machinery and the production of plywood?

A. Yes, certainly.

Q. That is what I was asking you, Mr. Conway. Do you agree with that? [201] A. Yes.

Q. So that over the year, if the productive capacity of the plywood industry increases, that would reflect itself in your sales, wouldn't it?

A. Yes.

Q. I want to show you a chart here, Plaintiff's Exhibit 59, and we have charted here the productive—the production of plywood beginning back in 1950. If you look in the year 1951, you will see that there was a sharp break in the production of plywood. Do you know why there was that break?

A. No.

Q. I thought you were familiar with the plywood industry from what you testified before.

A. Well, for me to sit here and remember what happened during the specific month of 1951 is rather difficult.

(Testimony of James B. Conway.)

Q. Don't you remember that there was a strike then? A. No.

Q. You don't?

A. There may have been. I mean, we are not concerned——

Q. How about, let's take a look here in 1954. You see a sharp dip in production here, a very sharp dip in July and August. Do you know why that was? A. No.

Q. You don't recall that big strike, do you?

A. No. [202]

Q. I notice that in the third quarter of 1951, which is taking the period beginning in July and August of 1951, and looking at this chart, Plaintiff's Exhibit 59, and the line which represents the production of plywood, I called your attention to it before, that there was a serious break. If you will look at your figures it shows that you had sales for six hundred sixty-three thousand dollars, the next to highest quarter that year. Apparently the break in the production of plywood did not affect your sales, did it, the fact that the mills stopped producing for the time that they were shut down did not affect your sales at all, did it? A. No.

The Court: What year are you talking about?

Mr. Kolisch: 1951.

Q. How long have you personally been in this business, Mr. Conway? A. About ten years.

Q. What has been your experience in this ten-year period in your machinery business? Has business gone up or down, or what has been going on?

(Testimony of James B. Conway.)

A. Well, the plywood industry has progressively grown, and our business has grown, been very good. It has progressively expanded.

Q. As the plywood industry expands your business expands with it, doesn't it? [203]

A. That's right, we sell mostly equipment that does cutting of logs.

Q. Who is the biggest buyer of plywood machinery in this country?

The Court: What do you mean? Do you mean what retail——?

Mr. Kolisch: No, who is the biggest buyer of plywood-making machinery in the country?

The Court: I know that; U. S. Plywood.

Mr. Kolisch: Is that correct?

Mr. Heilpern: Just this year; not before.

The Witness: We really do not have those figures.

Mr. Kolisch: No, sir, no.

The Witness: This specific quarter I don't think it is U. S. Plywood. I think a number of other manufacturers, we have sold as much equipment to other manufacturers as we have——

Q. (By Mr. Kolisch): Do you sell a lot to U. S. Plywood? A. Yes, we do.

Q. Didn't you just get a big order for the plant down at Gold Beach?

The Court: I think you have already told me that U. S. Plywood is the biggest customer of Prentice's also.

(Testimony of James B. Conway.)

Mr. Kolisch: No, that is not so.

The Court: That is what you told me?

Mr. Kolisch: I said they were a large customer. No, [204] they are not the biggest.

The Court: I do not think Mr. Conway is going to falsify the records over here because he gets an order from U. S. Plywood.

Q. (By Mr. Kolisch): With the equipment that you sell, Mr. Conway, have you ever had any complaints? A. Oh, yes.

Q. Is that a normal thing to happen?

A. Oh, I think our machinery is basically the lathes and the equipment that we design, I think is the best equipment that is manufactured.

Q. I am sure you do, but do you ever have any complaints and trouble with your customers?

A. We have very little trouble with any of our customers.

Q. No customer has ever written you and told you that there was something wrong with your machinery? A. Oh, yes.

Q. Have they ever complained——

The Court: I do not think you have to pursue that any further. I am not interested in that. I told you before that I assume Prentice's had trouble. They sold equipment in spite of that fact.

Q. (By Mr. Kolisch): You are competitive to the Prentices on how many pieces of machinery?

A. Well, lathes would be one, clippers, driers, and I am [205] not just sure if there are any more smaller equipment.

(Testimony of James B. Conway.)

Q. But that is all the major equipment, lathe and clipper and drier?

The Court: Well, show him that Exhibit Number 1.

Mr. Kolisch: Exhibit Number 1 (presenting to the witness).

The Witness: Well, I have come upon one.

The Court: Go ahead.

The Witness: The log barker here, we represent the Ederer Engineering Company. Then, I guess the lathes we are, we represent the Coe Manufacturing Company. The clippers are also built by the Coe Manufacturing Company. We manufacture roller veneer driers which will be in competition with Proctor.

I see they have the Capital Knife Grinder. We also manufacture a knife grinder which would be in competition with that machine.

Here is a sizing machine which is in competition with one of the list we handle. We represent Fletchinger who is in competition with Francis mixers.

We handle Baldwin presses which are in competition with Fjellman presses.

The Court: Apparently, except for the patching machine, you carry about the same line as Prentice; is that right? Is that true or not?

The Witness: Well, there are several other machines here [206] which we do not have competing lines to.

(Testimony of James B. Conway.)

Mr. Dezendorf: He has just picked out a few, your Honor.

The Witness: I think I have picked out all we would be in competition with, though.

Q. (By Mr. Kolisch): Where did you get these figures in this Exhibit 214?

A. These are contracts or orders that we placed with the Coe Manufacturing Company broken down in quarters.

Q. How did you get these figures? What is your source?

A. They were totaled by our bookkeeper from the invoices of the Coe Manufacturing Company.

Q. I cannot hear you.

A. They were totaled by our bookkeeper, and we have books showing the amount of orders placed out of invoices, received from the Coe Manufacturing Company when we place those orders.

Q. You sell, as I think you testified to, other lines of equipment besides those made by Coe, don't you? A. That is correct.

Q. Coe relates to plywood machinery, and you have other lines of stuff also that come from others, don't you?

A. Yes, we are a manufacturers' representative.

Q. You are a manufacturers' representative here? A. That is correct.

Q. Getting back to these figures, you just asked your bookkeeper to write down these figures; is that right? [207]

A. These were taken off the——

(Testimony of James B. Conway.)

Q. Did you take them down or did you check them?

A. No, our bookkeeper took them out of our invoices.

Q. Did you check them?

A. No, I have not checked them.

Q. You just asked your bookkeeper to do that?

A. Well, our invoices from the factory were totaled, and it was a two or three-day job to prepare these figures.

Q. But you had no personal supervision? You do not know whether they are accurate or not, do you?

A. No, I didn't figure them myself.

Q. Does this Exhibit 214 represent all your sales from all sources?

A. It does not. It represents only the sales that we placed with the Coe Manufacturing Company.

Q. Well, did you ever total your complete line?

A. No, we haven't. Our sales with the Coe Manufacturing Company amount to 95 per cent of our sales volume.

Q. When did you become aware or feel the competition of Prentice's?

A. Well, they don't bother us too much.

Q. You are not competitive then?

A. Well, we are competitive, but I think on the basic pieces of equipment that we handle such as our roller veneer dryers and our lathes and things we do get most of that business. [208]

Q. They have never taken away any lathe business or anything like that, have they?

(Testimony of James B. Conway.)

A. That is a misstatement because they certainly had.

Q. They did. When did you start feeling their competition in lathes?

The Court: What is the purpose of this interrogation? Do you want to show this man is prejudiced?

Mr. Kolisch: Well, I am trying to show that his sales might have been affected when the Prentices came into the business.

The Witness: Usually our sales are affected most when our delivery gets too long. If we can make delivery in, oh, from 30 to 60 days, why, we normally get most of the business, but we are not bothered too much by our competitors.

Q. (By Mr. Kolisch): You cannot pick any date as far as feeling, for instance, lathe competition with the Prentices, the Jackson lathe?

A. No, I don't know when they started with them.

Q. But you do know that they have taken away sales from you, haven't they?

A. Why, certainly.

Q. How about the driers? That is a big piece of equipment, isn't it?

A. Yes, it is, but to my knowledge the only two driers I am familiar with were the ones installed in Vancouver and [209] the one that they took away from us that went to Alaska. Other than that, I don't believe they have sold any. I could be mis-

(Testimony of James B. Conway.)

taken, but they have been very little trouble with the driers.

Mr. Kolisch: No further questions.

Mr. Dezendorf: That is all.

The Court: You did make out those figures by months rather than by quarters, didn't you?

The Witness: No, we only broke it down in quarters. We could break it down.

The Court: So you do not know in which month of a quarter that you did this business?

The Witness: No, it was only broken down quarterly. We could prepare this on a monthly basis.

The Court: Sometimes when you write an order it is as a result of a number of months of work?

The Witness: That is very true, very true. We very seldom just have somebody come in and order something. I mean we work anywhere from a month to six months time on an order.

The Court: Is it your testimony that there is a direct correlation between the price of plywood and sales?

The Witness: We have found that to be true. Under the present conditions where everybody is making, should we say, [210] lots of money, why, we have people come into the office that just order things immediately, and usually when the price has substantially dropped, if the plants are not making money, they certainly are not going to go in for any big expansion.

The Court: Is it your testimony also that the production of plywood also has a correlation?

(Testimony of James B. Conway.)

The Witness: Well, the production of plywood without a correlation, I imagine, in the price because under the present conditions now, why, most mills are running two or three shifts on all their cutting equipment. If the price of plywood drops, a lot of those mills will drop back to only one-shift operation. As long as the price of plywood is as good as it is, why, they will run a lot of three shifts a day, six days a week.

The Court: Would it be a fair statement to say that there is an immediate correlation between the price of plywood and orders for machinery, and a long-term correlation between production and the sale of machinery?

The Witness: I believe so, yes.

The Court: That is all.

(Witness excused.) [211]

WILLIAM J. MILLER

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dezendorf): Your name is W. J. Miller? A. Yes, sir.

Q. Where do you live, Mr. Miller?

A. Seattle, Washington.

Q. What is your employment or occupation?

A. I am the operator of a veneer plant and operate a plywood machine shop.

(Testimony of William J. Miller.)

Q. You are the president, are you not, of the Elliott Bay Plywood Machines Company?

A. I am.

Q. How long have you been in the plywood industry, Mr. Miller? A. 35 years.

Q. Does Elliott Bay Plywood Machines Company make heavy machinery for use in plywood manufacturing? A. We do.

Q. How long have you been in the manufacturing endeavor? A. About 14 years.

Q. Are you familiar with the Prentice Brothers here in Portland? A. Yes, I am. [212]

Q. Do you handle any machinery that is competitive with that that they sell?

A. Only one machine that I know of.

Q. What is that?

A. That is a veneer clipper.

Q. Is that used in all the plywood operations?

A. It is necessary in the manufacture of interior plywood.

Q. You make some other plywood machinery, though; do you not?

A. We make an edge gluer, just make two machines. They are used in the plywood industry. As far as I know, the Prentices don't handle an edge gluer.

The Court: What machine are you competitive with.

The Witness: The clipper.

The Court: Is that an expensive machine?

The Witness: Yes, it is.

The Court: How much does it sell for, about?

(Testimony of William J. Miller.)

The Witness: It sells for nine or ten thousand dollars.

The Court: So you have a good month or a poor month depending upon whether you sell one machine?

The Witness: That is right.

Q. (By Mr. Dezendorf): As I understand it, Mr. Miller, you lease clippers; is that correct?

A. That's right.

Q. At our request, have you prepared figures by quarters [213] showing the dollar value of equipment leased by your company for the years 1951, 1952, 1953, and 1954? A. Yes.

Q. Will you hand the Exhibit Number 215 to the witness, please?

(Exhibit referred to presented to the witness.)

Q. Do those figures on 215 represent the dollar value of the equipment leased by you in the period covered? A. Yes, it does.

Q. Mr. Miller, I believe you said also that you are the operator of a plywood plant? A. Yes.

Q. What plant is that?

A. The Elliott Bay Mill Company,—Machines Company.

Q. Where is that located?

A. Seattle, Washington.

Q. Are you familiar with the growth of the sheathing production in the industry?

A. Yes, I am.

Q. When did that start in a big way?

(Testimony of William J. Miller.)

A. Oh, in about the last three years.

Q. What amount, if any, does it contribute to the increased amount of plywood in the last three years?

A. Well, the sheathing industry is becoming a bigger factor all the time. [214]

Q. To what extent has it contributed to the growth of the productive capacity in the last three years? A. Considerable.

Q. Are you familiar with automatic veneer patching machinery?

A. To a certain degree, yes.

Q. Do you know whether automatic veneer patching machinery is used in sheathing production? A. Very little, if any.

Q. What correlation, if any, Mr. Miller, have you found to exist between sales or leasing of heavy plywood machinery and the price of plywood? A. What was that question again?

Q. Would you read it?

(Last question read by the reporter.)

The Witness: On a rising market there is always machinery prospect sales in sight. On the falling price of plywood, why, it slows up very materially.

Q. (By Mr. Dezendorf): As a matter of fact, I notice in your figures that in the fourth quarter of 1952 you did not lease any machines; is that correct? A. That is right.

Q. What happened to the price, if you recall, in that quarter of 1952?

(Testimony of William J. Miller.)

A. In 1952 on which quarter?

Q. Fourth quarter, 1952, fourth quarter where you show no [215] dollar value of equipment leased.

A. The orders just evidently did not come in with the declining price; that the market wasn't such that anyone went ahead with any of their projects.

Mr. Dezendorf: I will offer Exhibit 215 in evidence.

Mr. Kolisch: No objection.

(Document, Compilation of Dollar Value of Equipment Leased-Elliott Bay Plywood Machines Company, previously marked Defendant's Exhibit 215 for identification, was received in evidence.)

Mr. Dezendorf: You may cross-examine.

Cross Examination

Q. (By Mr. Kolisch): You lease your clippers, don't you? A. Yes, sir.

Q. And if a plywood plant is shut down, then you do not get any money, do you? Do you have any arrangement with them that they pay you when they shut down?

A. There is an abatement clause.

Q. There is an abatement clause?

The Court: This is not the income he receives. It is just the value of the equipment on the day he delivers it to them.

Mr. Kolisch: I am sorry, I misunderstood you.

(Testimony of William J. Miller.)

The Court: I was concerned myself. Isn't that right?

The Witness: Yes, that is.

Q. (By Mr. Kolisch): It is the value of the equipment on the day you deliver it?

A. Yes, sir.

Q. I am going to show you a chart here. It is the wholesale price index of soft-wood plywood as published by the United States Department of Labor, Bureau of Labor Statistics. You take a look at that. Does that look familiar to you?

Mr. Dezendorf: I would have to object to that at this stage. It is not an exhibit that has ever been suggested before, and it has not been shown to us. We have had no opportunity——

Mr. Kolisch: We have all been looking at the same statistics. I mean, it is Bureau of Labor statistics. We have never put on anything concerning price. These people testified that price is the whole thing now.

The Court: Is there any question about the authenticity of the document?

Mr. Dezendorf: I have never seen it.

Mr. Kolisch: I will show it to you.

The Court: I want to say this, that I think it is a very important document which you are now offering. It is something I have been wanting from the very beginning.

Mr. Kolisch: We are going to offer it, your Honor, and [217] we want it in if you think it is important.

(Testimony of William J. Miller.)

Mr. Dezendorf: If the Court please, this purports to be a chart from some records. It is not, your Honor, the wholesale price index.

The Court: Do you have a witness who can testify as to that?

Mr. Kolisch: I received it from Mr. Workman, and I am sure he can testify to it, but if there is any—this is not a question of argument. There is such an index, and if this is not correct we will put the right one in. Whatever it is, we will put it in.

The Court: I agree. I would like that testimony, that evidence.

Mr. Dezendorf: I frankly don't think this is correct from the information that I have which we got from the Timberman. It shows several price breaks that I recall myself in addition to what the Timberman shows that are not on this exhibit.

The Court: Mr. Heilpern should know what the price has been all this time. Don't you have statistics, Mr. Heilpern?

Mr. Heilpern: We will have them here.

The Court: Very well.

Q. (By Mr. Kolisch): If you will look at the period at the end of the fourth quarter of 1951, what do you see there?

The Court: Mr. Kolisch, I just want to say this to you, [218] that I think that this witness and the previous witnesses and a number of other witnesses can give us the facts. I do not see any useful purpose of interrogating these witnesses and asking

(Testimony of William J. Miller.)

for their conclusions because you can draw whatever inferences you want in your argument.

Mr. Kolisch: Of course, I would like to interrogate this witness on this question of correlation between the price break—he says as the price goes down, why, they stop buying his machinery. This chart shows that they had the biggest price break here in the end of 1951, and here he shows that he did the most of the—well, the second—fifty thousand dollars worth of business.

The Court: That is a good argument.

Mr. Kolisch: And in the fourth quarter of 1952 there was a small price break compared to that, and you did zero; is that correct?

The Witness: That is correct.

Q. These figures that you have, what does this represent, the appreciated value of your machinery or what? How do you arrive at these figures?

A. No, this is the sales value of the machines out.

Q. As of the date that you sell them?

A. Yes.

Q. That you lease them, in other words?

A. That we lease them. [219]

Q. That is the value of a new machine, a machine that you have manufactured and that you are sending out on lease? A. That is right.

Mr. Kolisch: No further questions.

Mr. Dezendorf: Thank you very much, Mr. Miller.

(Witness excused.)

Mr. Kolisch: Your Honor, perhaps at this time we should put Mr. Workman on to present this chart.

The Court: Let them put on their evidence on price. Mr. Heilpern says he has that evidence. If there is any difference, then you can put on Mr. Workman. At some stage in the proceedings we will permit Mr. Workman to come on.

Mr. Kolisch: I don't care, your Honor, I am sure that the statistics are the statistics, and if Mr. Heilpern has a chart, that is fine.

Mr. Dezendorf: We are ready to go back then to Mr. David Prentice. I find that one of our exhibits as marked there is incorrect, and I would like to substitute the letter of January 20, 1953, for another one of the same date that got in there through an error, as Number 131.

(Photostatic copy of letter of January 28, 1953, to B. Raimann from Norman K. Raymond, controller for E. V. Prentice Company, marked Defendant's Exhibit 131 for identification.) [220]

Mr. Dezendorf: The old number is 5 G-9.

DAVID PRENTICE

recalled, was examined and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Dezendorf): Mr. Prentice, when we left off it became apparent that you were looking at one letter of January 20th and I was looking at another one. Would you like to read the

(Testimony of David Prentice.)

one that is now before you which is now identified as 131? (Presenting document to witness.)

A. I have read it.

Q. Were you familiar with that letter which your controller, Mr. Raymond, sent to the Raimann factory on January 20, 1953? A. Yes, sir.

Q. That letter cancelled once and for all the order for 37 machines which you told the factory to hold up on and not deliver in March 24, 1952; is that correct?

A. Yes, this cancels the remaining 37 machines.

Q. And that is what you told them, to hold up on your delivery on March 24, 1952; is it not?

A. Yes, sir, same order.

Q. Mr. Prentice, what is the fact as to whether or not your organization was really pushing the sale of Raimann machines in June of 1952?

A. Well, the fact is we were pushing the sale of machines [221] actively trying to sell them.

The Court: In June of 1952?

The Witness: Yes, sir.

Mr. Dezendorf: Will you hand the witness Exhibit 180, please?

(Exhibit handed to the witness.)

Q. Is that Exhibit 180 a letter that you wrote to your brother, Robert, in El Paso on June 19, 1952?

A. Yes, sir, it is a personal letter I dictated.

Q. You wrote the letter to your brother?

A. That is right.

Q. On the second paragraph on page 2 did you write your brother as follows:

"The Patchers have slowed down considerably

(Testimony of David Prentice.)

and we don't have too many back orders on them, although we really haven't been trying to sell them too hard either. We are working very hard now on trying to get the Patchers accepted for a complete A-Grade, and I have tried my utmost and possibly I have succeeded in getting Henry Becker to either come out here again himself or send over a die maker in order that this matter of defective dies can be corrected. We have eliminated most of [222] the breakage on the dies, but we still have open spots on some of them as they weren't built right at the factory to start with."

Did you write that to your brother on June 19, 1952? A. I did.

Q. Was it a true statement at the time?

A. It was true so far as I am concerned. It was my feelings at that particular time.

Q. So you were——

A. As it turned out——

Mr. Kolisch: Let him finish.

Mr. Dezendorf: I did not know that he had not. I am sorry.

Mr. Kolisch: I think you did know.

The Witness: There is a lot of things. I think for sure here the patchers had slowed down as far as I am concerned. I don't know what is behind it. It is a long time ago. Maybe I had not got an order for a week or two, but, as it turned out, they didn't slow down, and you have one letter here out of possibly a great many I may have sent to my brother Bob, and what I might have said one day in a letter to him there is a good possibility I was

(Testimony of David Prentice.)

feeling completely different the next time I wrote him. Now in a personal letter—well, that is exactly what it is. [223]

Q. (By Mr. Dezendorf): You did not have any reason to try to mislead your brother, did you?

A. No, but reading this letter now after this long, I can see that I was probably apologizing to myself in a letter to him that I had not gotten an order for a while.

Q. Isn't it a fact, Mr. Prentice, that your main sales argument to a customer for a Raimann was that it was usable to make A-face patchers?

A. I used that argument, yes, sir.

Q. And that is really the prime selling point that you had for your machine, wasn't it?

A. I would say no, sir, for the simple reason that it was brought out earlier than that. The selling point of the machine is because it patches veneer. As a matter of fact, in checking over the orders I find that even now with the amount of machines we have out and on order and everything else there is still only about 30 per cent of them are used for A Grade. The other 70 per cent are for upgrading number D to C, number C to B, and so forth.

The Court: I think you ought to tell me about the different grades. What is the difference between veneer sheathing, different types of plywood? I have not found that out yet. What is the best grade called?

The Witness: A Grade.

(Testimony of David Prentice.)

The Court: A Grade, and what does that consist of? [224]

The Witness: Well, that would be a——

The Court: Piece of plywood?

The Witness: ——piece of plywood with defects all repaired.

The Court: Or no defects?

The Witness: Or no defects; yes, sir.

The Court: Don't they grade them S-1's and S-2's?

The Witness: That is when it is in the plywood, the plywood form. Then it is sound one side, but they use both terms. They can call off the sound one side or an A one side, and they could still be correct. I am not an expert as far as that is concerned on the grades. I know what they call them in the plant and what they ultimately have said out in the field.

The Court: What is the difference between a veneer and an A-Grade piece of plywood?

The Witness: Well, an A-Grade piece of veneer if it was glued up into plywood and no defects happened, after that then it would be an A-Grade piece of plywood. It is the face of the veneer itself.

The Court: It is the face of a piece of plywood that is called veneer?

The Witness: Yes, sir, well, you take two pieces of veneer or more and put them together. Then they become plywood. [225]

The Court: What is sheathing?

The Witness: Well, sheathing, there is many

(Testimony of David Prentice.)

grades of it, I believe. It is a word that has been going around here. Usually it is an unsanded piece of plywood that they use just for sheathing outside of a house. I think it has taken over in great respect where they used to use lumber, shiplap. They now use 4-by-8-foot plywood panels. It is unsanded and rough.

The Court: What about knots?

The Witness: Well, contrary to what has gone on, my experience has been that, so far, that every sheathing plant has purchased a patcher that I know of because they still have the same problem there. They have—I am not familiar at all with sheathing grades, but I know they must have size grades and C and D sheathing or something like that. On C and D sheathing, for instance, that would have knots all over it. I mean open knotholes, and they are going to have to be repaired. Wherever, for instance, we want sheathing, if they call it that, they have to have the knotholes repaired so that it gives a smoother face without any holes in it.

The Court: In your view, it does not make any difference what grade of veneer it is, the companies want patching machines so that they can upgrade it at least one grade and perhaps two grades?

The Witness: That is correct, your Honor, not only to upgrade it but to even be able to use it in some cases. [226]

The Court: Is that right?

Mr. Dezendorf: It is not.

(Testimony of David Prentice.)

The Court: We shall hear your expert a little later. Mr. Prentice that is your view of the matter, isn't it?

The Witness: Well, yes, sir, that is what I have found in the plants I visited and talked to. Would it help your Honor if I gave an actual list of sheathing plants that are designated as such that have our Raimann patchers in operation?

The Court: You have already testified that the sheathing plants have patching machines. That is good enough for me.

Q. (By Mr. Dezendorf): To get back to where we were, I believe you admit that one of your main selling arguments in trying to sell a customer on the Raimann machine is that it was able to patch for A face? A. Well, it can patch for A face.

Q. That is one of the arguments that you used, is it not, in selling?

A. I think I have always used that; still do, yes, sir.

Q. Isn't it a fact that in the spring of 1952 the die trouble that you were having was such that the mills that you had sold Raimann patchers to were dropping out of trying to make A-face patch and were going back to the B with the Raimann patcher?

A. No, sir, I would not say that was the fact. Some of them were dropping out of trying to use it for A grade, and [227] others were starting to use it for A grade so the balance still remains the same there, within five to ten per cent.

Q. What percentage of the Raimann machines

(Testimony of David Prentice.)

that you had sold up through May of 1952 were then working on A-face material?

A. I would estimate about 25 per cent of them.

Q. Isn't it a fact that in May of 1952 many persons to whom you had sold Raimann machines were losing confidence in them because they would not consistently cut an A-face patch?

A. Could I hear the question again?

(Last question read.)

A. I would not say many of them, no, sir. We had some of them that were very anxious to get that done, and we were working as close as we could with them.

Q. I ask that Exhibit 175 be handed to the witness. The old number of this is 5 B-8 C.

(Document presented to the witness.)

Q. I assume you wrote that letter, Mr. Prentice, May 22, 1952; is that correct?

A. Yes, sir.

Q. Does the first paragraph read as follows, and this, by the way, is to the Raimann factory; is it not? A. That is correct.

Q. "I have just returned from another trip out in the territory and am sorry to state that the situation of the patcher as of now does not look too bright. All of the plants [228] that were using the machine for the A grade have now changed their minds slightly on the machine due to the fact that, on occasion, it gives poor quality. This poor quality is the result of faulty dies and also of faulty inspection by the men at the plant."

(Testimony of David Prentice.)

Did you say that to the factory at that time in that letter?

A. I said that to the factory, yes, to Mr. Becker.

Q. Was it true?

A. No, sir, again it was not true as a true fact.

Q. Now, taking you over to the first complete paragraph on the second page of that letter, did you say this:

"Due to the fact that our logs are not what they were a great many years ago, the Douglas Fir Plywood Association has allowed an A face to have a patch in it, but this patch has to be a very fine patch and up until the advent of the Raimann Patcher to this country, the only A-grade patches were made on the machines that you saw when you were here. They were boat shaped and were beveled on the edges. I believe you took some of those samples back with you and will recall them. [229] With the Raimann machine, there were people that have bought this machine to patch A grade. When the dies are real tight and the veneers are patched in such a manner that there is no glue leakage through the face of the panel, then this has been accepted by the DFPA for an A grade. The DFPA has approved approximately ten plants using the Raimann patches for A grade. Yet, of these ten plants, approximately four plants have stopped using it due to the fact that they have had complaints from the customers that they sell to."

Did you tell them that? A. Yes.

Q. Was it true?

(Testimony of David Prentice.)

A. No, I don't believe it was true. I would like to say something right now, if I can, because there is a lot of things in the letters—I owe it both to my customers and to the company I represent to try to get the best machines and parts from them as we can. As you will note, all the way through these letters you asked me did I say something, is it not true, and I say no it is not true. If you want to call it a lie that is all right. I do not consider it as such, but there [230] are letters not only to Raimann but to every person that we represent where we use any means that we can, and I think they are justifiable and the results prove that they must have been to get them to constantly keep on the ball as far as improving their equipment.

There is a tendency on the part of any factory to become complacent when they have a lot of orders and if things look like they are going good. I still write the same tenor of letters to these companies today.

Q. Let's go on to the next paragraph:

"It seems that, on occasion, the machine will patch very good. And then for some reason it will stop making a good patch and will either chip out the edges or the sides or mark them to a point where they are not to be utilized.

"One of the most important things we have noticed with regards to the dies is a case in point where we made up some sample patches on one of the machines that we have in stock with a set of No. 5 dies for the M & M Wood Working Company of Portland, Oregon. The samples were highly

(Testimony of David Prentice.)

approved, and so we took the same set of No. 5 dies down to a machine that they had [231] in operation, and when we put the No. 5 dies on that machine, it did a thoroughly poor job of patching. Rather than take a chance on getting any bad advertisement, I immediately had Denny remove that set of No. 5 dies and take a second set of No. 5 dies that we had just received. We put them on that machine, and it made all the difference in the world. I cannot, for the life of me, think why the dies would work well on one machine whereas they would not work well on another machine. All of the veneers were of the same thickness and of the same grade, and I have tested by running half a patch strip through on one set of dies and then changing the dies. Always, it makes a poor patch with the one die and a good patch with the other. I cannot in my own mind think of any reason why this should happen; yet it does.

"Another thing: we have had to take back approximately eight sets of No. 19 dies due to the fact that they would not work at the customer's plant. By not working, I mean they would not make a good patch." [232]

Was that a true statement?

A. I imagine it was, yes, sir, that we took back the No. 19 dies.

Q. Everything that I read.

A. Oh, everything that you read?

Q. That is right.

A. I would say possibly, yes, it would be a true statement that I had trouble with those dies.

(Testimony of David Prentice.)

Q. Now continuing over to the next page:

"However, the whole future of the Raimann Patchers here in the Northwest is going to depend on a good patch with all dies constantly . . . One of the corrections we have made was to grind out a great deal of metal from the bottom side of the table in order that a patch strip would come up level with the bottom of the metal die."

The Court: Mr. Dezendorf, wait a minute. Did I miss some, or did you miss some?

Mr. Dezendorf: Let's read it again. I did not intend to miss anything:

"However, the whole future of the Raimann Patchers here in the Northwest is going to depend [233] on a good patch with all dies constantly. We have been able to determine some things that have been troubling the machines and have been able to prevent them. One of the corrections we have made was to grind out a great deal of metal from the bottom side of the table in order that the patch strip would come up level with the bottom of the metal die. As the machines are shipped from the factory with the air slope and with the two ribs underneath the table, the heavier stock like 1/8 and 3/16 has a tendency after the patch has been cut out of it and the strips are left to hang up on this metal."

Did you make that statement to the factory?

A. Yes.

Q. Was it true?

A. On that particular machine, yes, it was true.

(Testimony of David Prentice.)

Q. Was the statement true?

A. On that particular machine that statement was true.

The Court: I think we can save quite a lot of time by assuming that every time he wrote a letter he wrote it and he represented the matters to be true. If it develops that [234] Mr. David Prentice wants to contend that any statement that he made was not true, that can be brought out on redirect examination or on cross-examination.

Mr. Dezendorf: Very well.

The Court: Otherwise, we will assume that everything in the letters are true.

The Witness: Yes, your Honor, that is true.

The Court: You bring them out with your own counsel.

Mr. Nikoloric: Wait a minute, your Honor, I do not want to complain about your ruling.

The Court: I am just trying to help you out.

Mr. Nikoloric: I do not want to go through these, your Honor, letter by letter. I'd like to have Mr. Dezendorf read to him all right, but I hope he is getting paid on a per diem basis.

The Court: That does not help me at all. You ought to know that.

Mr. Nikoloric: You know, your Honor, what the situation is on these letters, and so does everybody else.

The Court: It may be that he wrote falsehoods

(Testimony of David Prentice.)

to Raimann, but these letters are to his own brothers.

Mr. Nikoloric: Your Honor, look at the letter in June. They sold five patchers in June, the best they have had for nine months.

The Court: You will have all the opportunity you want [235] to argue the case at the conclusion of the evidence. I thought I was trying to do you a favor when I made this offer. Apparently I am not so the offer is withdrawn. Go ahead.

Q. (By Mr. Dezendorf): Now, the next paragraph:

"I have been informed by the vice president in charge of production of M & M that,——

The Witness: Wait, you are skipping a paragraph in there.

Q. I want to skip one. A. All right.

Q. Is that all right?

A. Yes, sir, but when you skip paragraphs, skip letters, everything else, it makes these things keep looking—I mean, I have to keep telling you, well, "Yes, this is true; yes, this is not true." I mean, if you want to get——

The Court: Are you of the opinion that he is taking paragraphs out of context?

The Witness: He definitely is, well, not paragraphs, I won't say that, but if you get a series of these letters together you would find there was a reason for all of them, but they are not together. There are certain letters that I have written to this com-

(Testimony of David Prentice.)

pany where I have dictated maybe four or five letters in one day, yet, only one letter is in this group.

The Court: Mr. Prentice, you do not need to worry about that. You have two competent lawyers here, and if they think any other letters should be put in, don't worry about it. They will bring in those letters.

The Witness: All right, sir.

Q. (By Mr. Dezendorf): Now, to get back, the third paragraph from the bottom:

"I have been informed by the vice president in charge of production of M & M that, if they could get the machine to patch A Grade even 80 per cent of the time, they would take the other 20 per cent as fall down and consider it B. If they could do that, they would probably have need for somewhere in the neighborhood of twenty to twenty-five machines. As you know, M & M is one of the larger plywood producers in this country and they, at the present time, have seven plywood plants and are in the process of building an eighth. That is the reason that they would use so many machines if the machine could be used for A. [237]

"Any help that you can give us along this line will be beneficial to both of our companies, and I think it is of extreme importance that we take care of this matter as soon as possible. The reason for the urgency is that, if the Raimann Patcher gets a bad name, it will take a great many years to get the industry to change its mind about it. Where we

(Testimony of David Prentice.)

have some plants now operating the machine for an A Grade if we get more plants to use it, soon it would become the custom and not the exception."

You wrote that to the factory; did you not?

A. I wrote this letter.

Q. Isn't it true, Mr. Prentice, that by August 22, 1952, the last one of the large companies that had been using your Raimann patcher to produce A face gave up?

A. I don't think that's true; no, sir.

Mr. Dezendorf: Will you hand the witness——

The Court: We might be able to save a little time on that. Did you say so in a letter?

The Witness: I tell you, I was constantly after Raimann. I was using anything I knew of, threats, and we even told [238] them to hold up orders and everything else in an effort to get their company to exercise better control over the die maker and also better control over the machines as they came to us. In Germany the machines are almost all hand-fit, and they have no way—I mean they had had a good inspecting system, I imagine, but I wanted it to be better. That is why I said early on this one particular machine that the situation was correct, there was some casting left out. That wasn't on any other machines. All of these letters were an attempt to get production of machines and the control of machines constantly better, which, as I say, I still write the same type of letters.

The Court: Let us see what he wrote. Which one?

(Testimony of David Prentice.)

Mr. Dezendorf: This is 182, August 28, 1952, from this witness to the factory, to the Raimann factory.

The Court: Let me take a look at the letter.

Mr. Dezendorf: The main portion we are interested in is the last paragraph on the second page.

The Court: All right, the last line on the first page of the letter.

Mr. Dezendorf: Go down to the bottom of the first page:

"The reason I feel there is such an immediate need is due to the fact that our last big company using the Raimann Patcher for A grade has now been forced [239] to discontinue its use for A and have reverted back to the B grade. Unless we can make a correction on these Patchers within the next 60 days, I fell that all will be lost in ever regaining our standing of having the Raimann patch accepted by the industry as an A grade patch; so you can see how extremely important this test will be." You wrote that; did you not?

The Witness: Yes, sir, I did.

The Court: What date is that letter?

Mr. Dezendorf: August 28, 1952.

Q. Mr. Prentice, by the summer of 1952 your organization was trying to sell the entire Raimann line; were you not?

A. We had the entire Raimann line to sell, and we were looking into it. I mean, if it was possible to sell any of the additional equipment, why, it was

(Testimony of David Prentice.)

necessary we start to build up the sale, plugging the machine.

Q. You had the right to sell the whole line at this time, did you not, if you wanted to?

A. The complete Raimann line of equipment; that is true.

Q. You had quite a little sales resistance to the other parts of the Raimann line; did you not?

A. Well, to say sales resistance, I don't think that would [240] be correct because we actually didn't—there is a number of things that we actually didn't even talk to customers about, some of the equipment in the line.

Q. Let me ask you directly, in October of 1952 did you or did you not encounter a lot of sales opposition to the rest of the Raimann line since it was built in Germany?

A. I will be honest by saying we encountered some resistance.

Mr. Dezendorf: Hand the witness Exhibit 184, please.

(Document presented to the witness.)

The Court: To whom was the letter sent?

Mr. Dezendorf: It is an inter-office memorandum from this witness to his brothers dated October 2, 1952.

Q. Do you have Exhibit 184 before you?

A. Yes, I do.

Q. It is directed to your brothers and your manager up in Vancouver, Canada; is it not?

(Testimony of David Prentice.)

A. It is.

Q. It was written by you; right?

A. Right.

Q. "Raimann has written me quite a lengthy letter wondering why we are not selling other machines of their manufacture, in particular their Band Resaws, Self-Feed Rips, Knothole Pluggers, etc. I explained to them in a letter that we were definitely trying to move this equipment, but were running into a great deal of sales opposition due to the fact that it is German-built machinery and there is good American-built machinery on [241] the market."

Did you write that to your brothers?

A. Well, I wrote that whole inter-office memo. I am wondering if we shouldn't continue with it. It explains that, I think.

The Court: Wondering what?

The Witness: Well, my brothers didn't even know about the equipment. I was the one that was receiving all the correspondence on it. I sent them an inter-office memo letting them know that the factory was at that time, and for that matter still is, wanting us to sell all the equipment that they manufacture. Some of the machines they manufacture have American counterparts here that it wouldn't even be worthwhile to bring them in. Other machines are different enough so that there is a good possibility, and we feel very strongly they have

(Testimony of David Prentice.)

good sales potential here in the United States and Canada.

Q. (By Mr. Dezendorf): Mr. Prentice, isn't it a fact that it was December 15, 1952, before you and the factory together had designed a new die which you thought would work on A-face material?

A. Well, there is a good possibility that that is a fact because we were constantly, between us, designing new dies, and still are.

Q. Mr. Prentice, isn't it a fact that it was the end of February, 1953, before you thought that you would be able to [242] sell any more Raimann machines for veneer patches?

A. I don't belive that is a fact; no, sir.

Mr. Dezendorf: Hand the witness Exhibit 190, please.

(Exhibit referred to presented to the witness.)

Q. The only thing I care about in this letter, Mr. Prentice, is on the last page, page 4, the next to the last—well, it is actually, I guess, the last paragraph:

"We are most anxious to try the new glue pot that you are sending over for the AFM, due to the fact that the sales potentiality on this machine should be very great, and even better than the Patchers have been to date. We also feel that if the tests on the new dies are successful, we can again experience a fine business in the ASA Models." By the way, ASA is your patcher; is it not?

(Testimony of David Prentice.)

A. That is correct.

Q. "It will be very important for you to send me just as soon as possible the cost and the delivery on the necessary parts in order to convert the present ASA Patchers for the spring-loaded defect ejector foot, and also the price on the new dies being as if the tests at Plylock are successful a [243] great many of the customers will want to change their machines over."

You wrote that; did you not?

A. I wrote that letter; yes, sir.

The Court: After the new defect ejector and the dies came in did a number of the companies make the change over?

The Witness: Well, that is a high percentage of them, but that particular die worked out very well.

The Court: What number is that, 29?

The Witness: That is the number 29, but the ratio is still the same. We still sell number 7 dies. We still sell 19. We sell all the dies of the entire line. We are trying to establish the 29 and 12 for two specific jobs, but the customers are pretty hard——

The Court: How about the part dealing with the ejector?

The Witness: The defect ejector foot?

The Court: Yes.

The Witness: Well, that looked extremely good to us at the time. It was a matter of actually compressing the patch so that the patch would be big-

(Testimony of David Prentice.)

ger than the hole. To be quite frank with you, although we have used it to demonstrate in our sales, there are machines that do not have that but do exactly the same job. Any sales item looks good, I mean, at the time——

Q. (By Mr. Dezendorf): Mr. Prentice, it was on [244] March 9, 1953, when the DFPA first approved an A face that was made with your number 29 die?

A. It is undoubtedly in a letter. Could I refresh myself with it? I don't remember that date offhand, no, sir.

Mr. Dezendorf: Will you show the witness 193, please, and 194?

(Exhibits referred to presented to the witness.)

Q. 193 and 194 are memorandums to your brother that you prepared telling about the DFPA approval of A grade on your Die 29; are they not?

A. It says here that the Raimann Patch Profile Number 29 as experienced with at Plylock, has been approved by the DFPA inspector for A grade.

Q. That would be the date what happened?

A. Yes, that I wrote or that they approved that patch at Plylock in Portland.

Q. That was the first time that the 29 had been used and had been approved for A patch?

A. It was the first time the 29 had been tried.

Q. Right.

(Testimony of David Prentice.)

The Court: But that does not mean that another die had not been approved earlier?

The Witness: No, sir, you see, the DFPA does not give blanket approval on anything, on hot-plate presses, on patches [245] or anything. Each plant has to be approved by the inspector for that job, many of the inspectors that have approved for different plants prior to that. Even today there is no such thing as blanket approval on any type of equipment.

Q. (By Mr. Dezendorf): I do not know whether your memory is this good or not, Mr. Prentice, but wasn't it on June 30, 1953, when you first were advised by the factory that they had a new model coming out with an electromatic clutch and which increased the cycle from 27 to 40?

A. 42—it would be about that time, yes, sir.

Q. Isn't it a fact, Mr. Prentice, that up until August of 1953 that you and your brothers deliberately slowed up on your sales efforts of Raimann machines until you could find out how the number 29 die was going to work, and you had frankly told the trade that you thought you had a die that was going to lick the situation and they had better wait and not buy until they could find out whether it was going to work or not?

A. I made statements like that ever since we have had the Raimann patcher. I made them first on the 19's, then on the 7's, on the 29's, on the 12, so to pin-point any specific time would not be the complete truth of the matter.

(Testimony of David Prentice.)

The Court: Show him the letter.

Mr. Dezendorf: 200.

(Exhibit 200 presented to the witness.) [246]

The Court: How much more is there on this with the witness?

Mr. Dezendorf: Not too very much.

Q. Do you have before you Exhibit 200 which is your letter of August 6, 1953, to the factory?

A. Yes, sir.

Q. I am starting with the first large paragraph on the first page:

"I very firmly believe that we should sell, before the end of this year, an addition 12 patchers in addition to the patchers you have yet to deliver to us. We have deliberately slowed up our sales efforts on the Raimann Patchers until we could have very good proof of how the #29 dies are working out as well as the #11 and #12 dies. At a sales meeting two weeks ago we all agreed that the #29 dies as well as the dog-bone-shaped dies were working out very satisfactorily for all concerned and we have therefore started a big drive towards selling the patchers again. We felt that it would be better to make sure that the machines would do the proper job in order that we could [247] guarantee them to the customers, which we now feel qualified in doing, so far as the #29's and dog bones are concerned. There are a great many people who are interested in the machines and we have been honest with them and told them to hold off ordering in order that all aspects could be determined."

(Testimony of David Prentice.)

You told them that, didn't you, the factory, in that letter?

A. Yes, sir, this is some reverse manipulation. After putting them down so long I wanted to let them know they were not quite too bad. I was getting some kind of hot letters from them about that time, too.

Q. Isn't it a fact, Mr. Prentice, that as late as December of 1953 that your company was getting a lot of bad publicity because it was taking you many, many months to get replacement parts for the machine?

A. That is undoubtedly another letter you mean where I am trying to get them to get parts over here faster, better, and everything else.

Q. But that was not true at the time; is that it?

A. I honestly don't know how much of that was true or how much wasn't true.

Q. Isn't it a fact, Mr. Prentice—— [248]

A. I don't mean true; how much it was an actual fact at that particular time.

Q. Let us get down to an actual fact now.

A. Let us.

Q. Isn't it a fact that the complete replacement part order which you placed with the Raimann factory in December of 1953 was not filled entirely for the entire year?

A. Oh, I wouldn't doubt that.

Q. Was that good for your name with your customers?

(Testimony of David Prentice.)

A. I don't say we had too much customer dissatisfaction because, being as I was keeping those people on the ball, why we were able to supply our customers pretty well.

Q. Did you ever have any sales resistance to the Raimann patcher on the ground that it was a very expensive machine, and weren't you asked on occasions if it could not be leased rather than bought outright? A. Was I asked?

Q. Yes. A. By who?

Q. By anyone. A. Customers?

Q. Yes.

A. I imagine that came up; yes, sir.

Q. As a matter of fact, you finally had to give in and start leasing the machines; did you not?

A. As a matter of fact, I think that we got together and agreed that we should lease them, being as it is more profitable to lease a machine than it is to sell it.

Q. When was it that you decided to start leasing machines?

A. I don't know, Mr. Dezendorf. Our records would show when we first made the first lease.

Q. Wasn't it in May, 1954?

A. Well, it sounds about right. We started leasing our complete line of machinery, clippers, jointers, patchers.

Q. Isn't it a fact that you had to start leasing Raimann machines in order to increase your disposal of them?

(Testimony of David Prentice.)

A. Oh, it undoubtedly—well, yes, I know that it made selling easier.

Q. That is all.

The Court: We will take a ten-minute recess.

(Recess taken.)

Cross Examination

Q. (By Mr. Kolisch): Mr. Prentice, at the same time that you were writing to your brother Bob about how tough things were, were you writing to customers trying to sell them Raimann machines, and to help you refresh your recollection I will hand you three letters here signed by you, dated March 20th, and sent to the Cascade Plywood Corporation, United States Plywood, and Veneer Products Company. [250]

The Court: What year is that?

Mr. Kolisch: 1952.

The Witness: These are my letters that I sent out to customers at the same time I was writing to Raimann, and, like you say, to my brother Bob telling—particularly Raimann telling him all the trouble we were having.

Q. (By Mr. Kolisch): What was the gist of these letters? What were you trying to do with respect to these customers?

A. I was telling them how good the machine was and all the advantages that this machine would be to them and how easy it was to operate.

Q. Are these letters representative of letters that you sent to others?

(Testimony of David Prentice.)

A. Yes, sir, they are, they are representative of quite a few, many I probably sent.

Q. Were you trying to sell Raimann machines at all times? A. Yes, sir, I was.

Q. Tell us briefly why did you write letters such as those that Mr. Dezendorf questioned you on in which you told the Raimann Company that business was terrible and that they could not sell any patchers here, et cetera? What was the reason for that, if there is any?

A. There was a reason for it. It was my responsibility in the company to keep trying to get the patchers as well as other machinery constantly improved, and that was my way of [251] doing it. I will admit that quite often I was quite often out of line so far as actual fact was concerned although I had never considered it a falsehood. I thought that results were the main end and results are what we have got and I think we will get in the future.

Q. Talking about results, did you get any orders in June of 1952 for Raimann patchers?

A. I imagine we did; yes, sir.

Q. I would like to have you look at Plaintiff's Exhibit 59.

The Court: I think that has all been gone into already.

Mr. Dezendorf: In addition to that, the orders would be the best evidence and not some secondary evidence coming through someone else.

Q. (By Mr. Kolisch): Number 59 is testified

(Testimony of David Prentice.)

to as having been prepared from the orders. How many orders for Raimanns did you have in June?

A. It must have been five.

The Court: How many in July?

The Witness: July, it would be one.

Mr. Kolisch: I will offer as Plaintiff's Exhibits 83, 84, and 85 these three letters.

The Court: They may be admitted.

(Carbon copy of letter of March 20, 1952, to Cascade Plywood Corporation from David [252] V. Prentice, marked Plaintiff's Exhibit 83 for identification and received in evidence.)

(Carbon copy of letter of March 20, 1952, to United States Plywood Corporation from David V. Prentice, marked Plaintiff's Exhibit 84 for identification and received in evidence.)

(Carbon copy of letter of March 20, 1952, to Veneer Products Company from David V. Prentice, marked Plaintiff's Exhibit 85 for identification and received in evidence.)

Mr. Kolisch: Your Honor, as a result of a question which you put to Mr. Dezendorf after we had closed our case in chief, you showed a great interest in the monthly records of orders for machinery in the year 1952, and I have had prepared over the recess a breakdown of monthly orders of machines other than Raimann patchers for the months of '52 and in dollar value. I would like to show this to the witness.

The Court: Did he prepare it?

(Testimony of David Prentice.)

Mr. Kolisch: No, they were prepared by Mr. Workman; however, the witness had the original records.

The Court: Why don't you do that on your case?

Mr. Kolisch: The reason, if it is just for the Court, should we call him back later? We can do that. I want him [253] to explain the contents of some of these orders.

The Court: Who do you want to explain the contents?

Mr. Kolisch: I would like to have David do it.

The Court: Is it stipulated that if Mr. Workman were called he will testify that this exhibit was made from the original records of the company?

Mr. Dezendorf: Yes.

The Court: Very well, have it marked, and it is admitted.

(Document, Compilation of Monthly Orders of Machines Other Than Raimann Patchers, marked Plaintiff's Exhibit 86 for identification and received in evidence.)

Mr. Kolisch: Looking at Plaintiff's Exhibit 86, I note that in the month of July you had orders for $55,220 worth of machinery other than Raimann patchers. Can you tell me roughly from whom you received the bulk of this order, dollarwise?

A. Roughly about $40,000 of that was received in one order from M & M Woodworking Company for their Lyons plant and one order from the Mt. Baker Plywood Plant.

(Testimony of David Prentice.)

Q. In August you had roughly $20,000 worth of orders, and do you know for whom the bulk of those orders were?

A. Approximately $16,000 of those orders were from Medford Veneer and Plywood Corporation.

Q. Did you have any particular relationship with Medford? [254]

A. Yes, sir, I did, I was on their board of directors, and I had an agreement with them that started in February of 1952 that they would buy as much of our machinery as they could. The $16,000 I referred to as August is just the tail end of their orders.

Q. Did the Medford people know about the July 25th letter of the Associated people charging you with patent infringement?

A. Yes, sir, they did.

Q. What was their reaction to it?

Mr. Dezendorf: If the Court please, that is the rankest kind of hearsay, I think.

Mr. Kolisch: He has testified that he was on the board of directors of Medford and I think he can speak for them.

Mr. Dezendorf: He can speak for himself; not for the company.

The Court: Up to now the record shows that most of the companies were very sympathetic to Prentice. If you want to bring in any customers to say that they were afraid of Prentice, I think they ought to be brought in.

(Testimony of David Prentice.)

Mr. Kolisch: We have already submitted testimony of that nature, your Honor.

The Court: From whom?

Mr. Kolisch: From Mr. Power.

The Court: Mr. Power said it did not make any difference to him. [255]

Mr. Kolisch: May the witness answer the question?

The Court: Go ahead.

The Witness: I had to assure the board of directors that when we got this final portion of the order that I not only personally would stand behind them but would see that my company stood behind them that the orders would get out and be made and they would go into their plant.

Mr. Kolisch: I will offer also a monthly breakdown of the E. V. Prentice Company for the year 1953 of orders, Plaintiff's Exhibit 87.

(Document, Compilation of Schedule of Orders Received for Machines, marked Plaintiff's Exhibit 87 for identification.)

Mr. Kolisch: Q. Looking at Plaintiff's Exhibit 87, do you know if any orders from Medford Veneer were carried over into 1953?

A. I doubt that any orders were carried over in there. I believe all the machines were supplied during 1952.

Mr. Kolisch: That is all.

The Court: Mr. Prentice, it appears from these figures that the difference between a good month

(Testimony of David Prentice.)

and a poor month is the sale of one piece of equipment, isn't it?

The Witness: Well, that represented actually four pieces of equipment in that $40,000 I referred to in July. That was [256] three clippers and one jointer, and the order for Medford, I believe, was made up of above five pieces of equipment.

The Court: I notice in May of 1952 before the letter, you had orders totaling $135 for the whole month; is that right?

The Witness: I believe that is right. Could I look at that?

(Document presented to the witness.)

The Witness: Yes, sir.

The Court: However, if you had sold one Fulton rollpress during that month you would have had a very good month because that sells for about $35,000, doesn't it?

The Witness: That is correct, yes.

The Court: So the point is that the sale of one large piece of equipment makes the difference between an excellent month and a poor month?

The Witness: Usually it is when the order comes in for that piece of equipment. The sale usually precedes the order considerably.

The Court: Mr. Prentice, tell me the name of one company that did not buy a large piece of equipment because of the Smith, Tuck letter.

The Witness. One that did it, Hugo Erdmann at Martin Brothers Box Company told me that they were not going to order anything from us until

(Testimony of David Prentice.)

everything had been settled and they [257] knew, he knew exactly where we stood financially and everything else. Now, that carried on beyond the point of the end of the trial, as I say, at the fall of the year.

The Court: Did you know that Martin Brothers Box were having financial difficulties themselves?

The Witness: I was not aware of that. The reason I had not heard is that we have sold them equipment on terms like that and didn't feel too frightened about it. I didn't know that.

The Court: Did they buy from you after that time?

The Witness: No, sir, as a matter of fact, they have not bought any of them since then.

The Court: Do you know of anybody else?

The Witness: Offhand, I would say no, sir.

The Court: If you have such testimony and if you are having any concern about it, I will subpoena them for you and bring them in. Are there any further questions?

Mr. Dezendorf: Yes.

Redirect Examination

Q. (By Mr. Dezendorf): You brought in a letter that you wrote, number 83, to Cascade, another one, 84, to United States, and another one, 85, to Veneer Products. You sold all of them Raimann patchers, didn't you?

A. Yes, sir, I think all three of those companies have bought some. [258]

(Testimony of David Prentice.)

Q. They did not respond to your letters though in the early part of 1952 in the sense that they did not buy then?

A. They didn't buy on that date; no, sir.

Q. They didn't buy until 1953, did they?

A. Well, possibly they may not even have bought until 1954.

Q. But you ultimately sold them?

A. What?

Q. But you ultimately sold them?

A. Not all they needed; no, sir.

Q. But you sold them as to the Raimann patchers?

A. I sold those companies Raimann patchers.

Q. Can you tell us what portion, if any, of the 1952 orders in the early months of January, February, and March for machinery, other than Raimanns, represented the Medford Veneer?

A. I could find that out. I don't know exactly, but I imagine there was—I had a fair share of orders in there from Medford.

Q. So that January, February, and March contain a lot of orders from Medford Veneer?

A. They undoubtedly—well, not January, February, or March. Well, March would probably be—I would like to check the records. I think that probably actually the Medford orders would show up possibly in June.

The Court: Bring them in tomorrow.

The Witness: I have one book here, your Honor.

The Court: Go ahead and look at it.

(Testimony of David Prentice.)

The Witness: You are asking now of 1952?

Mr. Dezendorf: Q. Yes, the early months of 1952. I think perhaps we could shorten this up if——

The Witness: I was going to try to find them. They should be in here and the date.

The Court: Why don't you give it to Mr. Maginnis. He could find it a lot more quickly.

Mr. Dezendorf: That is all.

Recross Examination

Q. (By Mr. Kolisch): I have one more question. Does the name, "Port Orford Plywood" bring back any recollection to you concerning lost sales?

A. Port Orford?

Q. Yes.

A. Well, I know that we didn't get much of an opportunity to talk to those people like we thought we were originally going to. They bought a plant about that time.

Mr. Kolisch: What was the situation with respect to Port Orford?

A. As I recall, it was about the time that they were setting——

Q. What time, Mr. Prentice? You have got to give us the date.

A. Well, it was the latter part of 1952. [260]

Q. What was going on?

A. Well, they were in the process of building a plywood plant and buying equipment.

The Court: Who runs Port Orford Plywood?

(Testimony of David Prentice.)

The Witness: I honestly don't remember the names of the people now, your Honor. I know we had correspondence with them. We tried to sell them one particular time, and they didn't buy any of the equipment from us.

Mr. Kolisch: Q. Did you have any commitments or any indications from them prior to July, 1952, that they were going to buy equipment from you?

A. Yes, sir, we thought that we had a good opportunity to sell them equipment.

Q. Had they given you indications prior to July, 1952? A. Yes.

Q. What happened after July, 1952?

A. Well, then they quit talking to us.

Q. What happened? Did they buy some place else? A. They ordered other——

The Court: You have been putting words into his mouth. If you want them brought in here, I will bring them in. Who are they?

Mr. Kolisch: I will have to find out about it, your Honor. That is all.

Mr. Dezendorf: That is all.

(Witness excused.) [261]

O. HENRY SCHRODER, JR.

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dezendorf): Mr. Schroder, where

(Testimony of O. Henry Schroder, Jr.)

do you live? A. Seattle, Washington.

Q. Are you connected with the plywood industry? A. Yes, I am.

Q. How long have you been connected with that industry? A. About seven years.

Q. What was your early employment in the industry?

A. As manager and director of the Douglas Fir Plywood Association.

Q. How long did you hold that position?

A. Three years.

Q. What was your next employment?

A. With the United States Plywood Corporation of Washington, at that time a separate subdivision, now just a part of the United States Plywood Corporation.

Q. What is your present capacity with the United States Plywood Corporation?

A. General Manager in the Northwest Division.

Q. Would you please for our benefit tell us about veneer plywood, the grading and so forth so we will all get grounded [262] on it?

A. Standards for both veneer and plywood of the Western species are set forth voluntarily by the industry with the approval of the United States Bureau of Standards. Those standards describe four different grades of veneer. Veneer by the definition, is a thin sheet of wood of one-quarter inch of thickness or less. The four grades so designated in the commercial standards are A, B, C, and D and in a descending order of quality.

(Testimony of David Prentice.)

Plywood is a panel made up of an odd number of veneer layers with the grain of successive veneers at right angles at the time the panel is glued up. These four veneer grades and their definitions have been arrived at over a period of years somewhat as a compromise between what the log will yield and the demands of the individual user, of the consuming public. The panels that are made from these veneers are designated under various trade names; however, fundamentally, any plywood panel can be described simply by using the veneer designations with those designations applying to the face and the back of the panel. By way of illustration, the AA panel would have the best grade of veneer on both sides of the panel. The AD panel would have the best grade on one side and the lowest quality grade on the back side. The four grades of veneer are each described and designated primarily in terms of the individual use for which they are best fitted. [263] when made up into panel form so an A grade of veneer is the highest quality grade intended principally for natural finish or light stain finishes. In other words, it is a face that has great decorative possibilities. Obviously, a face of that kind must either be clear of defects such as knots, pitch streaks, splits, or those defects must be repaired while the veneer is still in veneer sheet form.

It is also obvious in terms of these intended individual uses that any repairs that are made in an A-grade veneer must be neatly made and must, as near as possible, blend with the surround grain

(Testimony of O. Henry Schroder, Jr.)

and color of the wood. The B grade which is a second-grade of veneer is generally designated as a solid grade. The concept of that would be that you can repair defects so that you produce a good paintable surface but not necessarily a surface that will be desirable for light stain or transparent finishes; therefore, a plug may be put into your wood that does not necessarily conform with the surrounding grain although it must be reasonably neat and matching on the edges.

The C grade of veneer——

The Court: I think you have gone into enough about that. What is the difference between veneer and plywood sheathing?

The Witness: Veneer is a single layer of wood a quarter-inch in thickness or less. Plywood is a combination of three or more plies. Sheathing is a panel grade of plywood with [264] a C face on one side and a D face on the other. It is the lowest grade panel that the industry manufactures according to the standard.

The Court: What else do you want to know from this witness?

Mr. Dezendorf: Q. Is sheathing sanded?

A. Generally, no; however, on occasion it can be touch-sanded.

Q. The A, B, and C plywood are sanded; are they not?

A. The panel grades for those veneers as to the face or back are generally sanded, yes.

(Testimony of O. Henry Schroder, Jr.)

Q. When did the increase in sheathing production occur, Mr. Schroder?

A. It dates from about 1952 on.

Q. What proportion of total production of plywood did sheathing become from then on?

A. In 1952 it was roughly 10 per cent of all plywood produced. Today it is probably better than 25 per cent of all plywood produced on the West Coast.

Q. Was there any use of automatic patching machines in the development of sheathing in the years 1952 and 1953? A. Virtually none.

Q. Is that a very recent development in the use of automatic patchers on sheathing which dates back just a short while?

A. I may explain that by saying late in 1953 the industry began to produce a grade which they then called a plug sheathing [265] grade for underlayment; however, it was not recognized in the "Commercial Standard" until the most recent issue which was in the spring of this year. The production was a relatively small volume in 1953 and gained in volume in 1954 and 1955.

The Court: Is that fourth type of plywood stained or colored?

The Witness: No, sir, it is intended primarily to be used as a sub-floor for overlayment with tile or linoleum, plugging the knotholes so that a woman's high-heel shoe would not go through the floor, a relatively new utilization of plywood.

Mr. Dezendorf: Q. As a matter of fact, sheath-

(Testimony of O. Henry Schroder, Jr.)

ing is used for quite a lot of cement form, things of that kind?

A. Not sheathing, no, it is your special grade form that has a B on both sides.

Q. What type of patches were put on A-grade veneer in 1950 and prior years?

A. Sheet patches were almost entirely used, so-called "Flying Dutchman" or boat-type made principally by the Globe Machine.

Q. How did they operate?

A. Well, it is a two-step operation. First the defect is cut out in sawing operation. The veneer then moves to a second machine where the patch is inserted and hot-plat glued. [266]

Q. So that the patch is actually glued in the veneer? A. Yes.

Mr. Dezendorf: You may cross examine.

Cross Examination

Q. (By Mr. Nikoloric): Mr. Schroder, do you know whether or not beginning in 1947 through to, say, early 1950 some of the companies making sheathing and which had utilized the boat patchers were changing over to the automatic device?

A. You never use boat patch on sheathing.

Q. No company ever did?

A. Not unless it was an accident and a piece of veneer fell down in grade.

Q. Were any automatic machines being used for sheathing at that time?

(Testimony of O. Henry Schroder, Jr.)

A. Are you speaking about 1950?

Q. Yes.

A. I doubt it for the reason that sheathing-grade veneers were better grades. You didn't do any plugging or patching to speak of. There might be a little bit of it, but I would say basically no.

Q. Do you know when they started changing them?

A. I testified a moment ago that would be 1953 approximately when they started to make plug sheathing.

Mr. Nikoloric: No more questions.

The Court: I would like to recall Mr. David Prentice. [267]

DAVID PRENTICE

recalled for further testimony, was examined and testified as follows:

The Court: Mr. Prentice, were you in the office quite a bit during the years you have been connected with the firm?

The Witness: Not quite a bit, no, sir. I was in there for a certain period of time, but then I was out on the road. I was out on the road more than I was in the office.

The Court: Do you know the customers of the Prentice Company?

The Witness: I know most of them; yes, sir.

The Court: Do the customers of Prentice Company make purchases fairly frequently, or is it a

(Testimony of David Prentice.)

sale once in a long time? Do you have regular customers?

The Witness: Yes, sir, I have regular customers, but they do not—I mean I am talking machines now—it is true they do not buy every day or every month. It takes a long time to build them on each particular piece of equipment. The orders sometimes coincide quite a bit and they may all come in at one time. Maybe we have been working on four or five.

The Court: In addition to the machines, what else do you sell to your customers; parts?

The Witness: Yes, sir, we sell parts to them.

The Court: What else? Do you do repairs for them?

The Witness: Most of the repair work that is done is [268] out in the field. Actually, it would be contract labor. That is something we just started doing recently though not to any extent.

The Court: So it may very well be that a regular customer might not buy anything for two or three years?

The Witness: Well, that is true. Of course, we consider everybody as a regular customer. In other words, I mean by that, your Honor, maybe you would be working on one plant or on a series of plants for certain items, and some of them buy and some of them do not.

The Court: In the normal course of operations when you are dealing with a mill, do they buy several pieces of equipment a year?

(Testimony of David Prentice.)

The Witness: Most of your big plants will have a budget that generally is approved. They will have it for different quarters, but they have a budget that is approved, and, in other words, you are trying to sell them machinery, and when they like it they put it in their budget. When the budget is approved by the directors, why then the order is placed with a, well, like with our company here.

The Court: Sometimes you get an order, and sometimes one of the other companies gets the order?

The Witness: Yes, sir, but the thing is you always have to be building up to that point. I mean, you always have, to be quite frank with you, I have never walked into anybody's office the first time and told them about a machine and had [269] them order it from me. That does not happen. It is constantly building it up, working with them, and having them buy the machine.

The Court: That is all I want to know.

(Witness excused.) [270]

EDWARD A. PRENTICE

called as an adverse witness in behalf of defendant, having been first duly sworn, was examined and testified as follows:

The Court: Why is Cy in the firm? Is that a brother?

The Witness: May I explain, your Honor?

The Court: Yes.

The Witness: He was the controller of the company for a period of time.

The Court: I saw some letters of his.

Direct Examination

Q. (By Mr. Dezendorf): Mr. Prentice, what was your feeling about economic conditions in July of 1952?

A. I would say that they were very good; that the whole thing was going, and I had a great deal of faith that we were in an expanding economy.

Mr. Dezendorf: Will you hand the witness Exhibit 153, please?

(Document presented to the witness.)

Mr. Dezendorf: Q. Is that a letter that you wrote on July 14, 1952, to the R. D. Wood Company in Philadelphia? A. Yes, it is.

Q. Let me read the letter:

"Attention: Mr. S. R. Rhoads. With regard to my letter of June 25th, and the Donald R. Seip Company and their [271] proposition on a hard board press, we would appreciate it if you would let us know when you will be able to send their press proposition to them. As mentioned in my previous

(Testimony of Edward A. Prentice.)

letter, sincerely hope that you can have it ready by July 15th for them as they request. However, your advices would be appreciated.

"The weather out here during the past few days has been extremely hot—perhaps a by-product of the Chicago Convention. It has closed down some of the logging operations in the area, and we have a few of our summer forest fires in progress right now. Business generally out here seems awfully slow with the steel strike seriously curtailing a great deal of normal production. I would guess that you folks must be suffering some shortages of your own, but trust that this thing will be of short duration and will not cause a major cutback in civilian production. [272]

"I am wondering how you folks have found business in your own area, as well as reports from your other agents in other parts of the country. Frankly, we seem to be riding a fence out here, with everyone unwilling to say that times are good or times are bad, but they are just generally uncertain and for that reason a great many plans are being shelved for the moment."

Did you write that letter?

A. Yes, I did. Would you care to know why I said what I said? I would like to explain it.

Q. I am not going to ask you. Your counsel can if you wish.

The Court: Well, go ahead. Let me hear what you have to say.

The Witness: These people, the R. D. Wood

(Testimony of Edward A. Prentice.)

Company, are a very old firm, and we have had the pleasure of being associated with them since 1949, and at that time we had in them the only hot press that was possible in all variety and types, and for that reason we invited their account because it gave us an opportunity to quote on any type of press in that field. Obviously, when you are not selling a man's product you still want to make him feel pretty good and at least explain to him why you are not getting the business [273] for him, and the letters that I wrote to Mr. Rhoads in this fashion have been duplicated since this letter and are in that same fashion.

The Court: You mean you are still not doing very much business for them?

The Witness: No, sir. They are in the Cadillac field, and not very many people want to pay the price of a Cadillac in the press field.

Mr. Dezendorf: Q. Mr. Prentice, by September of 1952 your trouble with the die chipping situation had become very serious; had it not?

A. The die problem was always with us, Mr. Dezendorf, since we have been using the machine.

Q. I am sorry, I did not hear the answer.

A. I say the die problem has been with us all the time since we have been using the machine because the dies are a highly useful part of the unit. Every time it patches a piece of veneer you use the die, and naturally it is going to wear or chip.

Q. Wasn't the situation particularly critical in September of 1952?

(Testimony of Edward A. Prentice.)

A. Not to my knowledge.

Mr. Dezendorf: Will you hand the witness Exhibit 154?

(Document presented to the witness.)

Mr. Dezendorf: Q. Is that a letter that you wrote to [274] the Raimann factory on September 22, 1952? A. Yes, it is.

Q. The first paragraph: "As Brother Dave has mentioned to you many times in his letters, we have a very serious situation with this die chipping problem, and as a result we had Brother Charlie devote a good deal of time to examining this problem from all viewpoints to see what might be done on this end to alleviate the problem and possibly improve the repair situation." Now, going over to the first paragraph on the second page:

"Now I am sure that you folks or your die maker have had considerable past experience in this problem of tempering, but in our urgent search for a satisfactory solution to this very important problem for our customers and quite naturally for the future customers who might be interested in your patching machines we request your immediate thoughts on this approach to the problem,"

and so forth.

You wrote that letter; did you not?

A. Yes, I did.

Q. Mr. Prentice, you are the one that sent out the letter to the trade, are you not, in behalf of

(Testimony of Edward A. Prentice.)

your company advising [275] them of the successful outcome of the patent litigation?

A. What letter is that?

Q. The letter of November 26, 1952, signed by you, which is Exhibit 156. Would you show that to the witness, please?

(Exhibit presented to the witness.)

A. Yes, I wrote that letter.

Q. Will you hand to the witness Exhibit 117, please?

(Exhibit presented to the witness.)

Mr. Dezendorf: Q. Do you have the 117 before you? A. Yes, I do.

Q. That apparently is unsigned, but it bears the initials DPM. Do you know who that would be?

A. I would guess Dennie Miller, our service man.

Q. I assume that this report was made direct to you by him; is that correct?

A. Not necessarily; no, sir.

Q. To whom was it made?

A. I don't recall it, but possibly it could have been to myself and to Mr. Raymond, to Mr. Dave Prentice, to any one of us, if you will let me read it——

Mr. Nikoloric: I would enter no objection if you would want to examine Mr. Ed Prentice on this. I read the letter. I remember it.

Mr. Dezendorf: Q. To shorten it up, Mr. Prentice, that explained the difficulties that were encountered by your service [276] man with the ma-

(Testimony of Edward A. Prentice.)

chines at Sylvan Products and Buffelen, does it not?

A. Yes, the fact that they were using bad stock, had not been taking proper care of their dies; yes, sir.

Q. Is that all it says?

A. I mean, you were referring to one part of the paragraph.

Q. Doesn't this letter show the mechanical defects that there were in those two machines that had to be corrected?

A. Well, I read: "I instructed the mechanic in the operation and adjustments of the machine. I also talked to Mr. Buckner about the machine. I told him about stock strips and asked him to use the best stock they have from the strips for patching, and to get the strips cut as close to the right size as possible. I found the dies were in very bad shape; they don't seem to have had the proper care, but I believe Mr. Buckner will see that they are kept in better shape now."

Q. Just go ahead, read all of it. Start with the first. A. Should I read it?

Q. Please do.

A. "On Monday, June 9th, I visited the Sylvan Products plant in regards to the Raimann Patcher. I instructed the mechanic in the operation and adjustments of the machine. I also talked to Mr. Buckner about the machine. I told him about stock strips and asked him to use the best stock they have for the strips. I found the dies were in very bad

(Testimony of Edward A. Prentice.)

shape; they don't [277] seem to have had the proper care, but I believe Mr. Buckner will see that they are kept in better shape now. He seems very proud of the fact that when he was at Tyee they never had to call on the Prentice Company for help on the patcher. Therefore, I believe the machine will be kept in very good condition as long as Mr. Buckner has anything to do with it."

Q. Keep going.

A. You want me to read the whole thing?

Q. Go ahead.

A. "Tuesday I was at Hardel's at Olympia. The patcher was operating O.K. but one set of dies would not patch well enough for A-grade. They ordered a new set. One set of their dies had been broken and repaired. I brought this set of dies back with me to see what I could do in regards to fixing them to make a good patch.

"Tuesday afternoon I was at Buffelen in Tacoma. I replaced a small spring and the clutch assembly and made a couple of minor adjustments on the No. 1 patcher. They were working O.K. but Dutch was complaining about one set of dies on the No. 2 patcher, so I brought a sample back with me for you to see. At Buffelen, as in other plants, they are not using the best grade of material they can get to make the patches. Until these people are educated to use the best material for their patch strips, they will not get A-grade patching. Of course, sometimes we have found that it is in [278] the dies, and not always in the patch strip."

(Testimony of Edward A. Prentice.)

Q. For my purposes you can go ahead to the last paragraph on page 2.

A. "After leaving Rainier, I went over to North Pacific. They still have only one machine set up, and it is working O.K. The only thing they have to complain about is that one set of dies is not doing the job they thought it should. I asked them to use the best material they had for patching strips and try to cut the patching strips as close to proper size as they could. I brought a sample back with me, and I agree that the dies are not getting the patch they should, although, the material is not what it should be. I believe if they used better material the dies would do a better job."

Q. Thank you. Will you hand the witness Exhibit 119?

(Document presented to the witness.)

The Court: Are you the man in the office?

The Witness: Not at the moment, your Honor.

The Court: You are not the letter writer?

Mr. Kolisch: We have the office man here, your Honor.

Mr. Dezendorf: Q. Mr. Prentice, I assume this Exhibit 119 is written to Jackson Industries by Bill Kilde who, I assume, was one of your employees; is that correct? A. Yes, sir.

Q. Are you familiar with this particular letter?

A. No, sir. [279]

Q. On or about August 20, 1952, the date of the letter, you were having considerable trouble with the Jackson lathe; were you not?

(Testimony of Edward A. Prentice.)

A. Not considerable trouble, no, sir.

The Court: The letter is in evidence, isn't it?

Mr. Dezendorf: It is.

The Court: I will take a look at it.

Mr. Dezendorf: Q. Mr. Prentice, are you familiar with Exhibit 128 which is the report written by Mr. Becker to the Raimann factory just before he left out here, December 11, 1952, suggesting various changes that should be made in the machine?

A. Not offhand, no. May I see it?

Q. Well, the letter is there. It is in evidence so I guess that is good enough. That is all.

Mr. Kolisch: No questions.

Mr. Dezendorf: If the Court please, I am wondering if we could adjourn until tomorrow. Our next witness is not available this afternoon. He will be available the first thing in the morning, Mr. Don Daniels.

The Court: Don't you have an accountant?

Mr. Dezendorf: Yes, but we would rather put him on after Mr. Daniels. We can finish up very easily tomorrow.

Mr. Nikoloric: Your Honor, may I ask Mr. Dezendorf where these charts are that we are supposed to have, accounting [280] information?

Mr. Dezendorf: They will be here before five.

THOMAS H. PRENTICE

recalled, testified as follows:

The Court: Mr. Prentice, I notice that Mr. Heilpern and Mr. Kolisch and Mr. Nikoloric at the time

(Testimony of Thomas H. Prentice.)

that I asked your brother about companies that had refused to purchase during the critical period, and you had mentioned this Port Orford Plywood Company—are you the man that was dealing with them at that time?

The Witness: Unfortunately, your Honor, the one that was dealing with them at that time, as I recall, was Chuck Charles Prentice, although I was familiar——

The Court: Where is he?

The Witness: He is the partner, I mean the brother who retired from the partnership.

The Court: Do you have this account at the present time?

The Witness: No, I do not.

The Court: Does your firm have that account?

The Witness: That is handled on a general basis. Port Orford is generally sort of an underdeveloped area in so far as the regular route of travel is concerned. For example, you go to Coos Bay, and usually from there you swing on over to Grants Pass or some place.

The Court: Do you have a broker handling that? [281]

The Witness: Dave Prentice travels there about once every six or seven months, something like that.

The Court: How much business do you do with them now?

The Witness: We do not do any business with them now, to be honest with you. We have some of our equipment in there down there. I should say we

(Testimony of Thomas H. Prentice.)

do some parts business with them, excuse me, not machinery business.

The Court: That is all. You have no more evidence this afternoon?

Mr. Dezendorf: That is correct.

(Discussion off the record.)

The Court: We will recess until nine-thirty tomorrow morning.

(Evening recess taken.) [282]

Morning Session, December 14, 1955,
9:30 A.M., Trial Resumed

The Court: Call your witness.

Mr. Dezendorf: Mr. Don Daniels, please.

Mr. Kolisch: Your Honor, I have two requests I would like to make to the Court. Last night at five o'clock we received a mountain of accounting exhibits from the defendant. We have been told right along that these exhibits could not be provided to us before because of the fact that they were in answer to our exhibits. Now I have just started to go through those. I could not go through them with any great degree of specificity, and it will be necessary for us to look and have our accountants spend some time on it. I find after looking at these exhibits that this material which Mr. Hutchison acquired over a period of eight months, there is no reason that, I feel, we could not have had these a long time ago.

The Court: What do you want to do?

Mr. Kolisch: I would like to have time after Mr.

Hutchison testifies, which I presume will be today, to prepare myself properly on this mountain of accounting testimony.

The Court: Let me see what the testimony is and what the charts show. I think we could adjourn early this afternoon after he testifies, and we shall start in the following day.

Mr. Kolisch: Then with respect to one other thing, [283] that goes to exhibits which the defendant introduced yesterday, 214 and 215, those were the Elliott Bay and the Coe Manufacturing naturally it is the first time we saw these figures. Apparently they are unsubstantiated, and we feel that if the Court is going to put any credence or weight into these figures we should have an opportunity to look at the books of these people. No one testified who knew anything about it except that they asked the bookkeeper to make that. They wrote down some figure. If this is going to be of any importance——

The Court: You and Mr. Nikoloric ought to get together. When they offered them he just waved his hand, no objection, admitted them in evidence. Now you come in and say that you are concerned about the exhibits. I think you ought to make your objection at the time the exhibits are offered.

Mr. Kolisch: Perhaps we should have done it at that time, your Honor, and if we did not we were remiss in our duties, but I feel that these defendants have had a full and complete opportunity to go into all our books, and, furthermore, these competitors have undoubtedly had access to all this

information, and if there is going to be anything, any credence placed in this, we want to be able to check those figures. We want the same opportunity to go into their books as they have had to go into ours.

The Court: The difficulty is that you are not going into the books of anyone over whom they have any control. This man [284] has already been excused as a witness. In order to get those books, I would have to issue an order which would have no effect on this individual in Seattle, Washington; therefore, if he does not show you the books you would have to go into the State of Washington, the United States District Court, to get your subpoena to look at those books. This is not something that Mr. Dezendorf has any control over.

Mr. Kolisch: I understand that, your Honor, but how about the acts of Conway here in Portland?

Mr. Dezendorf: If the Court please, we can show through Prentice's own correspondence that over a year ago they considered trying to get these very same figures that we produced, and Mr. Bloch testified that they did write a letter to them, and they did not follow it up.

Mr. Kolisch: He testified they did not get any information. He just said that they wrote a letter and didn't get an answer to that.

Mr. Dezendorf: I assume it is true. Do you have any reason to believe otherwise?

Mr. Kolisch: No, I do not.

The Court: As far as Conway is concerned, he

testified that it took three days to get this information. Here is a man who really has not any interest in this lawsuit.

Mr. Kolisch: He is a bitter competitor.

The Court: He is a competitor. He says he is not [285] competitive, that his stuff is so much better.

Mr. Kolisch: He is a salesman. I am not really concerned about the person in Seattle. He has only one machine, the clipper. Conway has got a few more.

The Court: One of the other difficulties in that Conway is a competitor of Prentice. I do not see why he should open up all his books to Prentice and show him the names of his customers, everything of that kind. That is something that I do not think is exactly proper.

Mr. Kolisch: Of course, we have done the same. Perhaps we run that risk when we come into court. I understand that, your Honor, and we have opened our books completely. I suppose that is part of the risk of any litigation.

The Court: You do not have any choice about that. You had to open up your books, and, theoretically, Conway when he testifies, particularly when he did not have to testify if he didn't want to about those things, subjects himself to certain risks. I am going to think about that. [286]

D. W. DANIELS

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dezendorf): Your name is Mr. Don Daniels? A. D. W. Daniels.

Q. Where do you live, Mr. Daniels?

A. Hoquiam, Washington.

Q. How long have you been connected with the plywood industry? A. Since 1925.

Q. With what companies and associations have you been connected and in what capacity?

A. With the Harbor Plywood Corporation as Secretary-Treasurer, Vice President, and President; Director of Sales since 1949 to 1954.

Q. Have you been connected with any industry association?

A. I have been Chairman of the Management Committee of the Douglas Fir Plywood Association from 1938 to September of this year.

The Court: Is there any question about Mr. Daniels' qualifications?

Mr. Kolisch: No questions.

Q. (By Mr. Dezendorf): Mr. Daniels, are you personally [287] familiar with economic conditions in the industry and with price fluctuations during 1951, 1952, and '53? A. I am.

Q. What was the price pattern in 1951, '52, and '53?

A. Well, the price pattern in 1951 held fairly strong and level until later in October, 1951, when

(Testimony of D. W. Daniels.)

there was a drastic reduction in the sales which was accompanied by a downward price trend. Early in 1952 it rallied somewhat and recovered part of its losses. Business was fairly good for the first quarter of 1952.

Along in May and June it commenced to slip off a little. You perhaps recall that at that time we had a serious steel strike which lasted about eight weeks, and there was intermittent strikes in the plywood industry to some extent which affected the production, but even with the strikes in the plywood industry the orders fell off slightly in May and June. They continued fairly level, at lower level rather, during the summer, and then there was a serious break in October of 1952. That was recovered early in 1953, and while prices did not regain the high level that they had in former years they held fairly steady for 1953 and then showed gradual improvement over the last two years.

The Court: There was a serious break in October of 1952, and then what happened?

The Witness: Then there was some recovery in the early [288] part of 1953, and the situation improved but not too good, and it continued on a fairly even level during 1953 and showed improvement during the latter months of 1953 and improved further in 1954.

Mr. Kolisch: I am sorry, I did not hear the last answer.

Mr. Dezendorf: Would you please read the answer.

(Testimony of D. W. Daniels.)

(Last answer read.)

Q. (By Mr. Dezendorf): Mr. Daniels, what were the relative profits made by the well-established concerns in 1951 as compared with 1952?

A. Well, most of the leading concerns, as shown by their published statements, showed lower earnings in 1952 than they did in 1951.

Q. Has there been any correlation between the purchase of plywood machinery by the industry and the price of plywood?

A. Well, naturally, when the price of plywood is lower there are not the profits for the company. Every company proceeds with caution when they make capital investments at a time when they do not have profits to pay for those capital investments.

Q. When did the sheathing production become an important portion of the over-all production of plywood, and how has it progressed?

A. Along in the early 1950's there was sheathing made, of course, and sales promotion that had given some impetus to [289] the sale of it, supplanting Southern pine lumber and other products which had been formerly used for sheathing in various parts of the country, and I believe that in 1951 or 1952 the sheathing production accounted for about 10 per cent of the entire production of softwood plywood. This has been steadily increased since that time. In 1953, I don't know the exact figures, but there was some improvement, but the greatest amount has come during the last two years,

(Testimony of D. W. Daniels.)

and at the present time the percentage of over-all production varies from some companies to others, but averages somewhere between 25 and 30 per cent.

Q. To sheathing? A. Yes.

Q. Were automatic veneer-patching machines in use and in the sheathing production in the early years and in 1952 and '53?

A. Not to any great extent. The use of automatic patching, of course, by improved methods and techniques has come into greater demand, but it was probably the production or rate of production of overlaid and hardwood-faced plywood which brought the automatic patching into greater use.

Q. When did the automatic patching start on sheathing to any degree?

A. Well, I would say somewhere in 1953.

Mr. Dezendorf: You may cross-examine. [290]

Cross Examination

Q. (By Mr. Kolisch): What is the relative size of Harbor Plywood as compared to some of the other plywood manufacturing companies?

A. Harbor Plywood has potential production of around 120 million feet a year and produces—that is on the 3/8 inch rough basis—and produces around 100 to 105 million feet a year.

Q. How does that compare with the other plants? Where would that put you?

A. Well, there is only one other individual plant that exceeds that production, so far as I know.

Q. What is that? A. Cascade Plywood.

(Testimony of D. W. Daniels.)

Q. Isn't it a fact, Mr. Daniels, that most plywood concerns and particularly Harbor have a budget which they set up at the beginning of every year for the purchase of plywood machinery?

A. I couldn't say about other concerns, but I don't believe that there is a budget, so far as I know, that provides for the purchase of individual machines.

Q. Do you make any provision for buying machinery? A. Only as a replacement.

Q. You make no provision for buying new machinery?

A. Well, I am not—at the present time I am not making budgets for Harbor. [291]

Q. No, I am talking about when you were active.

A. There was no specific budget for the purchase of new machines. Any machine which would be purchased would be for replacement of machines which have gone into obsolescence or where new purchases were necessary because of repairs.

Q. But you did allocate then certain funds for the purchase of replacement machinery?

A. I don't think that you could quite put it in that category as budget for the replacement of machinery because you do not know what you are going to have to replace. If something goes haywire you have got to replace it whether it is in your budget or not.

A. As the manager of a plywood plant, you realize that machinery wears out, new machinery comes on the market, and you want to keep up your

(Testimony of D. W. Daniels.)

plant and to keep up your production. Don't you ever take into consideration money that you want to spend during the year on such machinery?

A. Not at the beginning of the year when you make your budget; no.

Q. Do you take it into consideration at any time during the year?

A. Any time the production department would come in with that recommendation that a new machinery would cut costs or was necessary to increase production, it would be taken up by the Finance Committee and their recommendation accepted.

Q. Is there any particular time with relation to the price of plywood when you are particularly interested in cutting the cost of your production?

A. I believe that any good management is always trying to cut costs. I don't think they would wait until the price went down.

Q. Is it reasonable that when the price goes down you are looking for machinery to help you cut the costs?

A. It would have to be pretty well proven that that would accomplish that purpose.

Q. But you would be interested in such machinery; would you not?

A. We would always be interested in anything that would cut costs.

Q. Do you make any reserve for depreciation of your machinery?

A. Depreciation, of course, is a part of your costs. We know what that is.

(Testimony of D. W. Daniels.)

Q. Do you make any provision to set aside portions of your profits for the replacement of machinery, buying new machinery?

A. No, I don't think——

Q. You never did that? A. No.

The Court: You do not set aside one or two per cent of your total gross sales in a fund for a renewal and replacement fund, do you? [293]

The Witness: No, sir.

Q. (By Mr. Kolisch): You testified that there was a correlation between plywood prices and the purchase of machinery; is that correct?

A. Yes.

Q. Is there any correlation between plywood prices and the price of stumpage?

A. There is if the market permits it.

Q. Isn't it a fact that stumpage prices have increased right along regardless of price fluctuations in the plywood market? A. That is true.

Q. And that you are always in the market for stumpage?

A. Oh, I would not say that we were, but I think the industry as a whole has a market for timber.

Q. Regardless of what happens to the price of plywood?

A. That's right, they have to have timber in order to operate.

Q. That would indicate to you a belief in the future of this plywood business and the expansion of the business as the years went along?

(Testimony of D. W. Daniels.)

A. I think that there undoubtedly is a forward expansion expected, and it will come.

Q. Do you know anything about the productive capacity of the plywood industry during the years with which you were familiar with it? [294]

A. Yes.

Q. Isn't it a fact that the productive capacity of the plywood manufacturers has increased right along through the years? A. Yes, sir.

Q. Isn't it a fact that machinery like the machinery sold by the Prentices is directly related to the productive capacity of the plywood manufacturers?

A. I don't think that I am in a position to answer that. I know that we have the same number of lathes and the same number of driers. We have the same number of presses and other machinery today that we did in 1949 and 1950 so, so far as my company is concerned, we have not increased our machinery any.

Q. Do you know that others have?

A. I would like to modify that statement. We have made different—we have purchased different types of machinery during the increase in production.

Q. Which would help increase your production?

A. Yes.

Q. Do you remember getting a letter from Smith and Tuck who were attorneys for Associated calling your attention to patent infringement by you out of use of the Raimann machine?

(Testimony of D. W. Daniels.)

A. No, sir, but I believe such a letter was received.

Q. Do you know Jack Rehm? [295]

A. Very well.

Q. Who is Jack Rehm?

A. Jack Rehm at present is Vice President in charge of production for Harbor Plywood Corporation.

Q. In 1952 what was he?

A. I believe he held the same position at that time. He would probably have received that letter, if it was written.

Q. Did he ever discuss it with you? A. No.

Q. Did you ever receive this information, and I refer you to a letter dated August 29, 1952, from Smith and Tuck for Associated——?

The Court: He says he did not receive any letter.

Mr. Kolisch: This is another letter. I am asking if he ever received information which I am going to read to him now. It has to do with Harbor Plywood. This letter has been introduced in evidence.

The Court: Go ahead.

Mr. Kolisch: "At the moment we are considering just what action should be taken directly against users of the Raimann machine and are weighing the various possibilities."

This is August 29, 1952.

The Court: Is this a letter directed to Harbor?

Mr. Kolisch: No, it is directed to Associated, and there is a mention of Harbor Plywood here.

(Testimony of D. W. Daniels.)

That is why I am asking [296] the witness if he ever obtained any information such as I am going to read to him.

The Court: Proceed.

Mr. Kolisch: "Yesterday we were called by Elmer Buckhorn of Portland who represents Harbor Plywood Corporation and with whom we discussed the matter. He advises that Harbor has six Skoog machines and only one Raimann; that he has already told his client that even if we should sue Harbor the latter would probably be better off to dump the machine in the bay than to defend the suit because his fees would exceed the worth of the machine to Harbor. He also opined that undoubtedly Harbor had a degree of immunity due to the fact that it was one of your better lessees. That may be, but at the same time we continue to feel that if Harbor wishes to continue using the German machine it should at least pay for the privilege. Possibly in the case of Harbor it would be best to arrange a license under the Skoog patents for the Raimann machine."

Did you have that information at that time?

Mr. Dezendorf: I object to the question.

The Court: Let him answer. Go ahead. Was that information brought to your attention?

The Witness: May I make a statement?

The Court: Certainly.

The Witness: I ceased to be president of Harbor Plywood Corporation in 1949, and matters of that kind would not come [297] to my attention as

(Testimony of D. W. Daniels.)

a general thing. This is the first time I have even heard that letter read.

The Court: Do you follow the market even though you have not been President of Harbor?

The Witness: I was director of sales until the first of January, 1954.

The Court: Do you know whether Harbor deals with Prentice Machinery and Equipment Company?

The Witness: I know nothing about it at all, sir.

Q. (By Mr. Kolisch): Isn't it a fact, Mr. Daniels, that at the end of 1951 and in the beginning of 1952 you bought equipment, including a steam engine and lathe and clipper and some odd parts, for Harbor Plywood which represent an investment of about a hundred thousand dollars?

A. I wouldn't know.

Q. Core lathe setup? A. I don't know.

Q. You do not know? A. No.

Mr. Kolisch: Your Honor, I don't know if I may use this controversial chart which we had before the Court yesterday, but if you will permit me I would like to show it to the witness.

The Court: Proceed.

Q. (By Mr. Kolisch): You testified, Mr. Daniels, that the [298] price of plywood was down at the end of 1951 and the beginning of 1952, didn't you? A. Yes.

Q. But you also do not recall any purchase of this equipment such as I have outlined to you?

A. That is right.

Q. You also testified that there was an improve-

(Testimony of D. W. Daniels.)

ment in the price of plywood in the latter part of 1953; is that correct?

A. I think there was, but whatever I said is in the record.

Q. I believe that is what you said. I mean, tell me. If that is incorrect, why, we will get it straight now.

A. No, I think that the prices showed some slight improvement in the end of 1953.

The Court: What is it in the chart?

Mr. Kolisch: It shows a very substantial falling off in the price beginning in August, 1953.

The Witness: This is a warehouse price index, and I would not know about the warehouses particularly.

Q. (By Mr. Kolisch): What price are you talking about?

A. Well, this is what this chart says, "Warehouse price and warehouse price index."

Q. The wholesale price?

A. The wholesale price.

Q. Is that what you were talking about?

A. I was talking about the mill price. [299]

Q. That is different from the wholesale price?

A. Not necessarily.

Q. Would they be the same?

A. I would not—I don't know where your wholesale price is obtained.

Q. I will tell you where it was obtained, the United States Department of Labor Statistics.

A. I don't know where they get it.

(Testimony of D. W. Daniels.)

Q. Where did you get your own prices?

A. From our own prices and from competitors' prices.

Q. You never looked at the whole industry then?

A. I looked at our competitors.

Q. You didn't know what every plywood manufacturer's price was?

A. Well, we sell plywood all over the United States. We get most of our competitors' price lists.

Q. You feel that your figures are more accurate than these?

A. No, I didn't say that, no, I didn't say I don't believe that prices improved during the whole of 1953. I said they showed improvement in 1953.

Q. I thought you said there was substantial increase?

A. Why not have the gentlemen look back and find out.

Q. You just tell me what your opinion or knowledge is now. If you want to change your statement, it is all right with me.

A. My recollection is that prices in 1953 were rather stable. [300] They had the usual decline in the latter part of the year as they always have in practically every year when buying lets up a little.

The Court: Mr. Daniels, prior to the time you came here today to testify did you refer to any books or records to determine what the price was during the perious for which you testified?

The Witness: Not after 1953, no. I mean not

(Testimony of D. W. Daniels.)

after the latter part of 1953; for the first seven or eight months of 1953 and 1952 and 1951.

The Court: You did?

The Witness: I did; yes, sir.

The Court: What books and records did you examine?

The Witness: Well, I had my own invoices.

The Court: You had your own invoices?

The Witness: Yes.

The Court: You checked those?

The Witness: Yes.

The Court: Go ahead, Mr. Kolisch.

Mr. Kolisch: Q. Has Harbor ever made sheathing in any substantial quantities?

A. Yes, sir.

Q. When? Give me some periods.

A. Up until—I would say our present production of sheathing runs about between 20 and 25 per cent of our total production. [301] It has run as high as 30 per cent.

Q. This is during what periods?

A. This is the last two years.

Q. All right, going back, say, to 1950.

A. In 1950 it, probably it ran about the same amount as the industry, around 10 to 15 per cent.

Q. Did you ever use Raimann machines to plug sheathing?

A. Not as sheathing, I don't think; however, that is something that I would not be familiar—that would be something that our production man would know more about.

(Testimony of D. W. Daniels.)

Q. Do you know how many Raimanns you had in, oh, up until 1953?

A. Well, you just read a letter that said I had one in 1952.

Q. Did you get any more?

A. We have more now, and we are buying more.

Q. As I understand it, you have four, and you have got three on order; is that correct?

A. I think so. I am not—I don't know that as a matter of fact, but I believe that is true.

Q. Is it traditional that the price of plywood falls off at the end of every year?

A. It has been for a long, long time for the reason that building lets up in the winter. People don't like to stock plywood, and they just don't buy until after the first of the year. Now, that is in a normal market. In the present market that is not true. Prices have maintained a high level right through winter. There has been a softening of maybe individual items, but not as a general rule.

Q. Over the years have the rises counterbalanced or more than compensated for the falls in the price of plywood? In other words, is the general trend of prices up?

A. Well, plywood is selling less today than it did in 1951.

Q. I am asking you whether the general trend of prices of plywood over the period of years in which you have been associated with this industry, which is considerable, has been up.

(Testimony of D. W. Daniels.)

A. Yes, the prices have shown an increase over the years.

Mr. Kolisch: That is all.

Mr. Dezendorf: That is all, Mr. Daniels, Thank you very much.

(Witness excused.) [303]

WILLIAM P. HUTCHISON

produced as a witness in behalf of defendant, having been first duly sworn, was examined and testified as follows:

The Court: Do you have any lumber accounts?

The Witness: That we do accounting work for?

The Court: Yes.

The Witness: Yes, your Honor.

The Court: How about plywood accounts?

The Witness: We have done some plywood accounting, and we are presently doing some plywood accounting for companies in Oregon.

Mr. Kolisch: Your Honor, I would like to make an appearance for Mr. Carey.

The Court: Mr. Carey may sit at the counsel table.

Mr. Hutchison, how long have you been a C.P.A.?

The Witness: I have been a certified public accountant since 1945. I received my certificate in 1945.

The Court: Did you once work for the bank?

The Witness: I spent three years at the First National Bank some years ago, sir.

(Testimony of William P. Hutchison.)

The Court: Is there any question about the qualifications of Mr. Hutchison?

Mr. Kolisch: No question.

The Court: His qualifications are admitted.

Direct Examination

Q. (By Mr. Dezendorf): Mr. Hutchison, at my request you have done some work on the Prentice records. Will you just tell us generally what the over-all scope of your work was?

A. Well, our office has been examining accounting records over the last eight months and these financial records covering records for three of the Prentice companies, E. V. Prentice Machinery Company, Prentice Machine Works, Incorporated, and the E. V. Prentice Company, Limited, of Vancouver, Canada. In connection with our work, we have examined the general ledger of the company, all the journals which record the original transactions. We have looked at income tax returns, financial statements prepared by the company, and other supporting correspondence and accounting information to assist us in our work. The work in examining these three companies was performed under my supervision by three men from my office, and it included a trip to Vancouver, B. C., for examination of records of the Canadian company.

Our work was done in two phases as we initially were restricted only to examination of records of the E. V. Prentice Machinery Company in Portland. Later by stipulation we gained access to the

(Testimony of William P. Hutchison.)

records of the Canadian company and the Prentice Machine Works, Incorporated, of Portland. We also examined all the sales invoices, customer account activity [305] for all companies for all particulars. From this information we reconciled the information as we found it to the company statements from the books to the tax returns, and we have extracted certain information which has been the basis for the preparation of our schedules and graphs which we have prepared.

Mr. Dezendorf: I wonder if we might interrupt this witness.

The Court: Mr. Hutchison, will you please step down.

(Witness temporarily excused.) [306]

JAMES D. SCOTT

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dezendorf): Where do you live, Mr. Scott? A. In Seattle, Washington.

Q. What is your business or occupation?

A. Certified public accountant.

Q. Is the Wienker Company one of your accounts? A. It is.

Q. What business is it engaged in?

A. The sale of plywood machinery.

Q. Are you familiar with the particular items or type of items it sells? A. Yes.

(Testimony of James D. Scott.)

Q. What are they?

A. Oh, there is lathes and just plywood machinery, but I am not a machinist——

Q. At our request have you brought here today the gross sales figures of the Wienker Company for the years 1951 through 1954 broken down by quarters? A. I have.

Q. Will you produce the information for us, please?

(Document presented.) [307]

The Witness: May I ask a question?

The Court: Go ahead.

Mr. Dezendorf: Please do.

The Witness: Mr. Wienker requested that this information not be given out for his competitors. It is all right to give to the Judge.

The Court: No, we cannot look at it otherwise.

Mr. Dezendorf: It is my understanding there was no objection to your giving just the gross figures without revealing the names of your customers, anything of that kind, just by quarters.

The Witness: That was not my understanding of it.

Mr. Dezendorf: I will have to ask that he be excused then. Mr. Heilpern made the arrangements.

The Court: Where is he?

Mr. Dezendorf: He was trying to find this witness because he was apparently late.

The Court: Mr. Scott, will you just step down for a little while, and then Mr. Heilpern will call Mr. Wienker and make arrangements. I am not

(Testimony of James D. Scott.)

going to force him to give this information if he does not want to.

Mr. Dezendorf: I think there has just been a slight misunderstanding because Mr. Heilpern has the figures, and we were just bringing this gentleman down in order to substantiate them, but I think the best thing to do is to let [308] us find Mr. Heilpern and straighten this out.

The Court: Yes.

(Witness temporarily excused.)

WILLIAM P. HUTCHISON

recalled, further testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Dezendorf): Mr. Hutchison, what was the original amount of capital investment by the partners of E. V. Prentice Machinery Company, and what has been their financial growth history?

Mr. Kolisch: What is the materiality of that?

The Court: You brought it out. They started out with four thousand dollars, I know that, and they did quite well.

The Witness: Should I answer?

The Court: Go ahead.

The Witness: We prepared a schedule showing the original investment of the E. V. Prentice Machinery Company.

Mr. Dezendorf: If I may interrupt, that is identified as Number 301 if the Court wants to have it before it.

(Testimony of William P. Hutchison.)

Mr. Kolisch: You have got to give me a chance to figure it out.

Mr. Dezendorf: Now the first is Number 1. You see, I have merely made them 300 so they follow the numbers you have except for the additional 300. [309]

The Court: Does this agree with the statements of the Prentice Company themselves, or did you——?

The Witness: We prepared these schedules from their books and financial statements and income tax returns as we found them, and we stopped our work at July 31, 1955, which was the latest information to which we had access. This is merely a statement of the partners' capital accounts to show the financial growth from 1948 when they started to 1955.

Q. (By Mr. Dezendorf): Can you just briefly highlight it in a few words?

A. I will just briefly explain why we have this schedule. It shows an original capital contributed in 1948 of $7,864.80. Then in later years there were additional amounts contributed, and it shows the total amount in the far column on the right of $28,158.84 as the capital contributed by all the partners to the company. Also, on the far right the total profits through July, 1955, are $893,652.87, and then further down the schedule it shows the amounts that have been withdrawn by the partners in total for $647,742.97. The difference of those amounts accounts for the ending net worth of the company at July 31, 1955, of $274,068.74.

(Testimony of William P. Hutchison.)

This schedule is merely to show the growth picture of the company as to capital invested, profit realized, amounts withdrawn, and ending capital balances.

Q. Mr. Hutchison, what was the original amount of capital [310] invested by the partners in the Prentice Machine Works, Inc., and what has been its financial growth and history?

A. The Prentice Machine Works, Inc., was organized in February——

Mr. Kolisch: What exhibit are you referring to, Mr. Hutchison?

The Witness: 302.

Mr. Dezendorf: 302.

The Witness: This company was organized in February of 1952 with an invested capital of $5,000, and this stock is now presently equally owned by the present partners of the company. The schedule which I prepared is to show the profits which the company realized before income taxes and before salaries to the Prentice brothers as this is a corportation. The far column on the right shows that the profits through July 31, 1955, are $95,790.89.

Coming down to the schedule of salaries of the Prentice brothers that they have withdrawn, $34,950. By the way, those are totaled at the bottom of the schedule as to the amount each brother received. The company has paid income tax of $7,484.61, bringing down the total net worth and accumulation surplus retained in this corporation at July 31, 1955, to $53,356.28.

(Testimony of William P. Hutchison.)

Q. (By Mr. Dezendorf): Mr. Hutchison, what were the total earnings of the Prentice companies from 1948 to the date which [311] you concluded your work, which is July 31, 1955?

A. To understand the total earnings of the Prentice brothers for that period, it would be well to bring in the information for the E. V. Prentice Company, Limited, as to how it affects that presentation. I have two schedules for that.

Q. That would be 303 and 303-A; is that correct?

A. That is correct. Now, the first schedule merely shows the information for Canada. That company was organized in September——

Mr. Kolisch: I am sorry, what exhibit?

The Court: 303 and 303-A.

The Witness: The Canadian company was organized in September of 1951, and the invested capital was $40. The company was substantially financed by the parent company in Portland. The profit that this Canadian company made, as shown on Exhibit 303-A is $134,139.37 at July 31, 1955, before income tax and before salaries to the Prentice brothers.

Coming down that very schedule we see that the Prentice brothers withdrew salaries of $32,000, and those are totaled below to each Prentice brother, and they paid income taxes in Canada of $22,947.02, and deducting those amounts, the present net worth and accumulated surplus of this corporation in Canada would be $79,192.35.

Now, going now to Schedule 303 or Exhibit 303——

(Testimony of William P. Hutchison.)

Q. That is 303-A. [312]

A. Excuse me. We have just recapped briefly the total investment in all companies made by the Prentice brothers, which shows at the lower part of that exhibit in a total amount of $33,198.84, comprised of $40 in the Canadian corporation, $5,000 in the Prentice Machine Works, Inc., and the other two sums of approximately $28,000 as the total invested capital in the parent partnership of E. V. Prentice Machinery Company.

Now, at the upper part of the schedule we have merely recapped the total earnings and the amounts withdrawn by the Prentices from 1948 through July of 1955, and that just shows briefly that there was $647,742.97 taken out in drawings from the E. V. Prentice Machinery Company by the salaries from Canada and Prentice Machine Works, and the other amount of $409,522.63 is the present net worth including their original investment which is retained in the companies as they now presently exist.

Q. Mr. Hutchison, do you have any figures to show the average percentage of return on their investment by years for the E. V. Prentice Machinery Company?

A. Yes, I prepared a profit schedule for E. V. Prentice Machinery Company of Portland.

Q. What is the number of that?

A. That is Number 304, and that shows the capital investment, meaning the amount left in the business as of the end [313] of each year in rela-

(Testimony of William P. Hutchison.)

tion to the net income or the net profit that was realized for each of those years, and then the percentage of the return has been computed thereon. It is interesting to note that in 1952 when a somewhat low amount was left in the business as a capital investment of $51,430.43 the profit was substantial for that year and actually represented a 269 per cent return under investment. This, however, of course, is before payment of any income taxes by the partners and is dealing in net income before taxes.

Q. 1952 was the highest percentage of any year, wasn't it?

A. It is according to the schedule as we computed it from 1948 through July of 1955.

Q. Mr. Hutchison, have you prepared any schedule which would show the amount of profits that were realized by each of the Prentice brothers over the length of time their companies have been in existence?

A. Yes, I prepared a profit schedule, Number 305, I believe, which merely adapts the figure which I earlier testified to of $1,124,215.60 and shows the breakdown of how this amount is derived and allocated to each Prentice brother as of July 31, 1955. The schedule merely shows their drawings, salaries, and present net worth broken down to each individual brother.

The lower part of the schedule is somewhat interesting for the reason that it shows the make-up of this amount of $1,124,215.60 which consisted of

(Testimony of William P. Hutchison.)

the original investment [314] in the three companies of $33,198.84, and then it shows the profits that they realized in their first three years of existence, 1948, 1949, and 1950——

Mr. Kolisch: I am sorry to interrupt you, Mr. Hutchison. I am having some trouble. I have an unnumbered exhibit here. I presume it is the one that you are talking about.

(Discussion off the record.)

The Witness: Do you have the one?

Mr. Dezendorf: He has it.

The Witness: This schedule, repeating, is merely an adaptation of a previous schedule, and I will conclude my remarks, the profits that they realized for the three years, 1948, 1949, and 1950 when there was only one company in existence, when they were just starting to reactivate the machinery-selling business, was $70,014.82. The profit realized in the last four years and seven months from 1951 through July of 1955 for all three companies was $1,021,001.94, which is the make-up of our total shown above.

Q. (By Mr. Dezendorf): Mr. Hutchison, do you have a presentation by graph of the total profits realized by the plaintiffs from their combined activities which would include the two companies in Portland and separately the Canadian operation?

A. Yes, we prepared a graph which is quite simple, Exhibit 306, which shows that information in three lines. The red [315] line is the combined annual profits of E. V. Prentice Machinery Com-

(Testimony of William P. Hutchison.)

pany and the Prentice Machine Works, which are the two Portland companies, and it is shown by years for from 1948 through 1954.

Our information for 1955 was not complete because the years were not—they were not at the end of their fiscal year so we have not put 1955 information on this graph.

The blue line shows the combined annual profits of all three companies including the Canadian company, and the lower black line at the bottom shows the annual profits separately for E. V. Prentice, Limited, the company in Vancouver, B. C.

The graph shows that from 1951 to 1952 to 1953, that there was a reduction in dollar profits realized although it is not substantial, and then from 1953 to 1954 to 1955 the information is strictly favorable, and there is a definite upward trend in their operating results.

Q. Mr. Hutchison, what did you do to develop information as to the history of the Raimann veneer-patcher sales and other sales and commissions for the E. V. Prentice Company during the year 1952?

A. To develop the important information for the year 1952 and also to show the information before and after that period, I have prepared two schedules from the records of the company which I think would be Exhibits 307 and 308. [316]

Exhibit 307 shows the sales by the E. V. Prentice Machinery Company of Portland. This is the one

(Testimony of William P. Hutchison.)

company in Portland—by year and by quarters from January, 1948, to June of 1955.

Mr. Kolisch: May I interrupt just a minute. You are talking about 307 now, and you are only referring to sales and not to orders?

The Witness: I am referring to sales by the company's records. This schedule shows a substantial year in sales was realized in 1951, and in 1952 the sales are down by approximately $139,503 over the year 1951. The schedule also shows that the first quarter of 1952 was substantial in sales and that the reduction starts in the second quarter, continues on into the third quarter, a slight recovery in the fourth quarter of 1952, which is the critical year.

The schedule also shows that 1954 has become a better year and that 1955 on which the schedule only shows seven months' sales, that the sales were $724,138 for seven months, which is a substantial increase in the most recent period for the company.

This schedule was merely drawn to show the actual sales by the company's books and records in this period.

Now, Exhibit 308 gives us exactly the sales as they show on the company's books month by month for the year 1952. The Exhibit 308 shows total sales by months. It shows commissions [317] earned by months, and it shows the Raimann patcher sales by months. We have also integrated the percentages that are applicable to this information.

(Testimony of William P. Hutchison.)

It is interesting to note that in January and in February, which we have sub-totaled, the company actually sold 45 per cent of its sales in the first two months. 41 per cent of its commissions were earned in the first two months, and 45 per cent of its Raimann sales were completed in the first two months. From March through July, the next five months which tie in the period of the letter in connection with the prior litigation, the sub-total for those five months shows that 30 per cent of their total sales were consummated in that period; 29 per cent of their commissions were earned, and 42 per cent of their Raimann business was sold.

The last five months of the year are sub-totaled separately, August through December, and it shows that 25 per cent of the sales were consummated; 30 per cent of the commissions were earned, and there was 13 per cent of the Raimann sales completed in the last five-month period of the year. In that connection you will notice in the months of August and September under the Raimann column at the far right that there were two sales completed, one in August and one in September, and then in the month of December, the month after the prior litigation, there were two Raimann sales sold in that month as shown by this schedule. [318]

This is the actual information from the company's sales records for the year 1952 by months, which shows a definite downward trend starting immediately after February which comes so early in the year that it, in my opinion, must be attribut-

(Testimony of William P. Hutchison.)

able to other factors than the letter which was written on July 25, 1952.

Q. Mr. Hutchison, did you review the gross-profit percentage realized by E. V. Prentice Machinery Company during its existence?

A. Yes, we reviewed the gross-profit percentage realized by E. V. Prentice Machinery Company from 1948 through 1955, that is, July of 1955, and I prepared——

Mr. Kolisch: I am sorry, I have another unnumbered exhibit.

Mr. Dezendorf: It is this big one, Number 9.

The Witness: 309 would be the one I am now referring to.

The Court: How many companies are plaintiffs in this case now?

Mr. Dezendorf: Two, the two Portland companies.

Mr. Kolisch: The Canadian company is not a plaintiff. As far as we are concerned, they are not in this.

Mr. Dezendorf: Go ahead, Mr. Hutchison.

The Witness: We were talking about Exhibit 309 which I prepared, showing the gross profit by years for E. V. Prentice Machinery Company of Portland. The average at the far right [319] on the third amount is 27.4 which is the average gross profit of all the years. That year 1952, the critical year, shows as 23.4 per cent for gross profit.

The immediately nine months after 1952, which is the first nine months of 1953, the gross profit

(Testimony of William P. Hutchison.)

jumps to 35.7 per cent in a nine-month period in which you will notice at the bottom of that column the sales were only $225,215.76. The schedule is merely drawn to show the trend of gross profits and to apply it to the particular years.

Q. (By Mr. Dezendorf): Mr. Hutchison, what is your opinion as to the correctness of the statement of income and expense for E. V. Prentice Machinery Company submitted by the plaintiffs in which the year 1952 was divided into two six-months periods showing a profit of approximately one hundred forty-six thousand for the first six months and a loss of approximately nine thousand for the last six months?

The Court: Which exhibit is that?

The Witness: I think it is 57. I am not sure.

The Court: Of the plaintiff's exhibits.

Mr. Dezendorf: I think that is right.

(Discussion off the record.)

The Witness: If you do not have it, I have it reproduced on the schedule that I have as Exhibit 310, or is it 311—310-A.

The Court: The one you are referring to primarily is [320] 58, isn't it?

The Witness: I don't have it in front of me.

The Court: Proceed.

The Witness: This is the E. V. Prentice Machinery Company?

The Court: Go ahead.

The Witness: In answer to your question about my opinion on the statement which was presented

(Testimony of William P. Hutchison.)

yesterday for the E. V. Prentice Machinery Company, I would like to submit the two schedules which I have prepared which are 310 and 310-A.

Mr. Kolisch: Which is 310-A?

The Witness: 310-A is the larger one. On Exhibit 310 we have presented the gross-profit figures for the first six months and the last six months of each year from 1949 to 1954 as taken from the exhibit yesterday, and we have also computed the average gross profits for the full year of those amounts that are shown, and it just shows that from 1949 through 1954 that gross-profit percentages vary a little bit between the first and second halves of the year but only in 1952 do we have an unrealistic gross profit of 10.8 per cent for the last half of the year in comparison with the 28.4 for the first half of the year, and it is from that point of gross profit that we move to Schedule 310-A—or Exhibit 310-A.

Now, Exhibit 310-A is restricted to the one year 1952. In the first column we have the total of the 12 months together for that year for this company, E. V. Prentice Machinery Company. [321] The next two columns show the schedule as it appeared on yesterday's exhibit where it splits the first and last six-months periods, but, as you will notice, with the gross profits used that this difference was 28.4 for the first six months and 10.8 for the last six months. The last two columns have been recomputed and redrawn by us—by me—to show the gross profit at 23.4 per cent, which is the average

(Testimony of William P. Hutchison.)

for the year, to present a more realistic gross profit percentage in terms of their past experience and also their experience ahead. As you will recall, earlier I testified that in the immediate nine months following this statement, the first nine months of 1953, the company realized a gross profit of 35.7 per cent on less sales than are shown for the last six months of 1952. There were actually less sales by over five thousand dollars for nine months in 1953 against six months in 1952, and yet your gross profit for 1953 is 35.7 per cent, and the schedule as shown to us yesterday disclosed gross profit of only 10.8 per cent for the last six months of 1952.

Now, following on down the schedule at the lower part you will find Operating Expenses for the year and also for the two six-months periods as shown on Schedule, Exhibit 57. Is that right, or 58?

Mr. Dezendorf: 58, I think.

A. The one of the plaintiff. Now, you will [322] notice at the far right we have asterisks on six accounts. Those accounts are shop and office rent, office supplies and expense, heat, light and water, insurance—general, property taxes and licenses, and uncollectible accounts written off. Now, the reason that we have put asterisks on those accounts is because if you notice the second and third columns as presented by the plaintiff those amounts have not been rateably distributed over those two six-months periods that have fallen heavily in the last six-months period and are substantially responsible for the loss of approximately nine thousand

(Testimony of William P. Hutchison.)

dollars that results from this application. In my opinion, uncollectible accounts, rent, property taxes, insurance, heat, light and water, office supplies and expense should fall at least rateably over two six-months periods rather than all in the last six months of 1952 so we adapted them. In fact, we changed one that may have been favorable and one removed unfavorable within the uncollectible accounts for more broader distribution of these expense balances in our presentation, and when you come down on that premise, using the average gross profit for the year and re-distributing some of these expenses more equitably, you find that the company realized a profit in the last six months of twenty-two thousand dollars instead of a loss of nine thousand dollars.

Q. Mr. Hutchison, did you determine the average gross profit percentage realized by Prentice Machine Works, Inc., the other plaintiff?

A. Yes, we scheduled the gross-profit percentages realized by the other company, the Prentice Machine Works, Inc.

Q. What exhibit is that?

A. That is Exhibit 311. It is very brief. It shows the gross profits realized for the three fiscal years. The dates at the top of this schedule should be for the years ending February 28th of each year so that the one that says 1953 has most of 1952 in it. It has ten months of 1952 and two months of 1953, and likewise across the page, in looking at this schedule briefly, we find that for the first

(Testimony of William P. Hutchison.)

two fiscal years, which would be principally 1952-53, the company averaged about 17.4 or 17.3 per cent.

Then the next fiscal year ending February, 1955, the profit practically doubled to 35.6 per cent, and the average, of course, of those amounts, is 23.8 per cent for that period.

The other interesting point on this schedule is that the sales by Prentice Machine Works, Incorporated, for the twelve months ending February 28, 1953, were $145,926.43, and the immediate year thereafter the sales were down, but then in the following fiscal year, February, 1955, they only reached a peak of $136,908.21 and never did fully recover to the sales that were realized in the year 1952, fiscal year 1952, which ended in February, 1953. In other words, their [324] highest sales year is principally allocated to the year 1952. This schedule was merely to develop the gross-profit percentage for that company.

Q. Mr. Hutchison, in connection with Prentice Machine Works, Inc., did you examine the schedule of profit and loss for the year 1952 as presented by the plaintiffs, and what are your comments on this presentation?

A. Yes, I have examined their schedule, and from it I have prepared Exhibit 312 and some photostatic copies of large records which would have numbers——

Mr. Dezendorf: 312-A and 312-B.

(Testimony of William P. Hutchison.)

A. 312-A and 312-B.

(Discussion off the record.)

The Witness: Now, if you will recall Exhibit 58 as it was presented, it showed that the first six months for Prentice Machine Works, which is March, 1952, through August, 1952, that there was a profit of about $24,448.50. Then it also showed in the last six months, September 1, 1952, to February, 1953, that there was a loss incurred of $14,361.48. That is shown in red on Plaintiff's Exhibit 58. We have recast that schedule. First we checked the schedule to the company's books, and we found (talking now about the sales for that year which were $145,926.43) we found that the sales had been presented in a manner other than that in which we found in examining the company's books and sales journals. The Exhibit 312-A [325] is a transcript, a photostatic copy of the sales journal as it appears on the company's books, and if you will notice there, the sales for the first four months at the top of the page, May, June, July, and August, total $58,196.95, in comparison with the amount shown on Exhibit 58 which I do not have in front of me but which was substantially in excess of $58,196.95. In looking then again at 312 over and following down to the middle of the page where it is ruled, you then find the total of $145,926.43. Now, that is the correct total sales for the year per the books and per the tax returns, but you can see that the division at August in relation to the last period, as per the books, should be made

(Testimony of William P. Hutchison.)

on the basis of $58,196.95 to the first six months and $87,729.48 to the last six-months period.

Now, this information that you find on Exhibit 312-A is substantially backed up in great detail on Exhibit 312-B which is the cost records of its sales in which they have costed out their sales by months and shown the cost of labor, material, and factory burden or overhead, and the sales information in these sheets which I won't go into detail on at this time placed these sales within the months that are shown on Exhibit 312-A which I have just discussed. So we prepared Exhibit 312 which we cast this first year for this company to show the sales as they were per the books, and you will notice that you have $58,196.95 for the first six [326] months and $87,729.48 for the last six months. We then applied the average gross profit percentage, which I previously stated was approximately 17.3 per cent, to these sales to arrive at a gross profit. We then allocated other income and expense in the same fashion, and we come down with the $4,022.69 profit for the first six months and $6,064.03 profit for the last six months in comparison with the substantial loss that was shown by Exhibit 58.

The other thing that is of interest is that the second and third fiscal years as shown by the plaintiff's exhibit were not switched around at all. They were exactly per the books by months as sales were actually made and as costs of labor, material, and overhead were actually incurred so that the only

(Testimony of William P. Hutchison.)

switch in their schedule was this first year, which is the basis for our recasting it in Exhibit 312.

The only other point of comment as shown on Exhibit 312 is that the costing records which we have examined for the Prentice Machine Works do not quite agree with the totals that were brought onto the tax return at the end of the year which may have been caused by substantial adjustments, but the thing of importance to me is that these records do bear out that material, labor, and overhead was incurred within the months in which the sales were consummated and billed and invoiced, and those are different from Exhibit 58 which was in evidence the other day. [327]

Q. Mr. Hutchison, is it not true that the profit and loss statements reviewed by you show larger net profit realized in 1952 over the year 1951?

A. Yes, we prepared a comparative statement of profits for this company for all years which, while it is a large schedule, I will merely limit my remarks to the year 1952.

Q. Is that Exhibit 313?

A. That is Exhibit 313, yes.

The Court: I think perhaps I should make a statement here on how I view this testimony. Really, I am not concerned about the Prentices starting from a small beginning and making quite a bit of profit. I do not think that there is anything wrong in doing that, and I think that it shows ingenuity and hard work on their part.

(Testimony of William P. Hutchison.)

Neither am I very much concerned about the fact that they may have made more profit in the year 1952 than they made in other years. I do not think there is a counterclaim by Associated asking for some money because they did send the letter, and I cannot see the relevancy of any of this information except to show one thing, that the harm, if any, caused by the letter was dissipated after the year 1952, and I might say that there is nothing in the record, so far as I am concerned that there was any such damage after the year 1952.

I am primarily interested in finding out what the effect, if any, of the letter on the business of [328] the Prentices during the critical period was, which I believe to be from the date the letter was sent to the first of the year or perhaps because of the testimony of the Prentices that it takes some time to develop a sale and also that in August of 1952 two Raimann machines were sold. I assume that the orders were taken or the sales developed perhaps in May or June of 1952; therefore, perhaps the date of January 1, 1953, is not a realistic date. It may very well be that it would be February or March.

I am also interested in the dates in which the orders were taken rather than the sales recorded. That is the information in which I am primarily interested, and the information upon which I will predicate a judgment, if any.

I am really not concerned about the methods of allocation, whether they made more profit in the

(Testimony of William P. Hutchison.)

last six months than they did in the first six months. I have told you that I want to see the months where the business was done because those figures are fairly significant to me. I have also told you that I am interested in the market conditions, the prices, what their competitors were doing. Those are the things in which I am primarily interested, and I do not want to spent too much time in argument as to whether the rent should have been allocated on a straight-line basis or the telephone calls allocated equally between the first six months and the last six months. That type of information is of no interest to me, so before [329] you go into any further examination of Mr. Hutchison I think I ought to tell you precisely what I think about these things, and now you can proceed any way you want.

Mr. Dezendorf: We are just about over the hump. We are coming to the comparison chart of the business, and it will be very short, but some of this is needed as background to get there. Will you go ahead in regard to 313, Mr. Hutchison?

The Witness: Well, 313 was merely to show the profits realized over the whole period by the Portland Company, and our schedule would differ from the one prepared by the plaintiffs for the year 1952 for the reason that in 1951 they adjusted their records for an installment basis on reporting income, and on their tax returns that amount reduced their income in 1951 and increased their income in 1952 and 1953 so, other than that, we

(Testimony of William P. Hutchison.)

substantially agree with their schedule, but it does show 1952 as a higher profit year than 1951.

Q. Mr. Hutchison, did you make any determination of the realization of gross profit by E. V. Prentice Machinery Company from the sale of Raimann patching machines in the year subsequent to 1952 to determine if they were able to recapture any of their market claimed to have been lost from the date of the July letter?

A. Yes, we have examined—I have an Exhibit 314. We examined the operating results of the company in the later [330] period after 1952 to see what the Raimann experience was in the later periods. This schedule shows three things. It shows prior to later periods by dates; it shows their gross profit from all sales and commissions for each year, and it shows their profit from the Raimann sales and then the per cent has been computed. Now, in 1952 they had a substantial return of gross profit from Raimann sales. In other words, 42.6 per cent of their whole gross profit came from the Raimann business. It fell off and was reduced somewhat in the nine months of 1953 when it went down to 25.9 per cent, but there are substantial increases in the last two fiscal periods, namely, the fiscal year 1954 when they went up to 77.3 per cent. In other words, $161,474 of their gross profit came from Raimann sales, which is 77 per cent of their gross profit from all sources, including commission income, and then even in the last ten months ending July, 1955, they had $213,593 of their gross profit came from Rai-

(Testimony of William P. Hutchison.)

mann sales which is 61.2 per cent. In my opinion, it just indicates that in the later periods they must have recaptured some of that Raimann patcher market, if any were lost, because of the high return that they made in the later periods.

The Court: This is a good time to take a recess.

(Recess taken.)

(Trial resumed.)

Q. (By Mr. Dezendorf): Mr. Hutchison, did [331] you make any determination of the source of total gross operating income for E. V. Prentice Machinery Company?

A. Yes, we did. Exhibit 315 is a schedule which we have prepared for this type of information.

This schedule was prepared for the total period of the company, 1948 through July, 1955, to show the breakdown of where the total gross operating income was derived. The total through July was $1,339,773.50, and it is broken down four ways from income from the Raimann patcher sales, income from the sales of other machinery, commission received, and rental income received.

We have also integrated those amounts into percentages at the bottom of the schedule, and the schedule shows that the Raimann patcher sales produced substantially more gross income than any other division of income received. In other words, there was $554,729.88 in gross income from the Raimann patcher which is 41.4 per cent of the gross operating income for the company for all years.

(Testimony of William P. Hutchison.)

The Court: Were you able to break down the rentals to determine what percentages of the rentals came from the Raimann patchers?

The Witness: The information is not broken down on this schedule, your Honor, but we do have the information in work papers, and it is my recollection that the Prentice Company went heavily into the leasing program with Raimann machines [332] in 1954 and 1955. They were not in the rental business in the earlier years for Raimann patchers. We can develop that information as to the exact rental income, if you wish.

Q. (By Mr. Dezendorf): Mr. Hutchison, have you made any chart or graph to show plaintiff's position with respect to others in the same business during the period involved?

A. Yes, we made a graph showing sales by quarters. That is Exhibit 316, by the way. It shows sales by quarters for the Prentice Machinery Company and two of its competitors, namely, Coe Manufacturing Company and Elliott Bay Plywood Machines Company. The graph has three lines. The red line shows the experience of E. V. Prentice Machinery Company from 1950 through 1955. The black line shows the Elliott Bay operating experience for the same period, and the blue line shows the experience of Coe Manufacturing Company for the same period.

I think it is interesting to note from this graph that the trend of these three companies which are competitive and in the same type of business fol-

(Testimony of William P. Hutchison.)

lows quite closely over the period of years from 1950 through 1955, and there is a definite down trend that shows quite obviously in the second quarter of 1952 and continues on down through the balance of 1952 on into 1953, and the recovery starts in 1954 and continues on up in 1955.

The graph was merely drawn to show Prentice's [333] position in comparison with its competitors on the basis of quarterly sales. I would say that if the trend lines, as I understood they were developed yesterday, were extended for Elliott Bay and Coe Manufacturing Company, it would be my opinion they might be quite comparable to the trend lines that have been extended for the Prentice Machinery Company based on this graph presentation.

Q. Mr. Hutchison, did you analyze the customer accounts and sales activity of E. V. Prentice Machinery Company during 1952 and the other years?

A. Yes, in connection with this—this, by the way, is Exhibit 317 which will be used for this explanation—our office looked at every sales invoice and every customer account and the activity on every customer account for all years for three companies, which was quite an extensive piece of work to determine who bought what, when they bought it, and how much the sales were involved in dollars and also to determine how many accounts they served.

This schedule is for the E. V. Prentice Machinery Company only, and it shows by year three things. It shows the sales, the number of customer ac-

(Testimony of William P. Hutchison.)

counts that were serviced by unit number, and it shows the average annual sales per account, which is merely dividing the number into the sales.

In that schedule we noticed from 1950 to 1951 they almost doubled their number of accounts serviced, and the [334] average sales in 1951 were about $8,301 per customer. In 1952 there was a slight reduction in number of customers serviced, and you will notice that the average sales is higher, $8,583, for that year. Then we have the subsequent information in 1953 which shows their sales are way down for the year, but their number of customers increased, and, of course, the average sale per customer is down, but it does not show that there was any serious trouble in customers. In fact, there is an increase from 1952 to 1953. Then 1954 shows a somewhat larger increase.

The other point on the customers' activities that we developed is this, and I am quoting from some notes that I have with me. The nature of the sales made by Prentice were non-repeat sales because of the large pieces of equipment that were involved in the four-year period, and with sales 1951 to 1954 we find these statistics: There were only two customers that bought over $5,000 worth of merchandise from the Prentice Machinery Company in each of the four years, 1951, '52, '53, and '54. There were two customers that bought over $5,000 every one of those four years. There were seven customers that bought over $5,000 from them in three of these four years. There were fourteen cus-

(Testimony of William P. Hutchison.)

tomers that bought over $5,000 in two of these same four years, and there were seventy-one customers that bought over $5,000 in only one of these four years. These statistics are to point up the fact that [335] there are not the repeat sales factors that would go with the plywood machinery business for multiple large sales year by year.

Q. Mr. Hutchison, what did you find as to the price increase that affected the Raimann machine during the period it was handled by the company?

A. In the course of our work we noted that the Raimann machine when it first came out in 1950 sold for $6,535, and that the price increased over a five-years period to $8,800, and this was a price increase of about 34 per cent in the price of this machine over a five-years period.

Q. Mr. Hutchison, do you believe that this price increase might have affected the potential sales of Raimann machines?

Mr. Kolisch: Objected to.

The Court: I think that is for me to decide, but I will let him answer the question. Go ahead.

The Witness: I think this substantial price increase of 34 per cent could have affected the potential market for Raimann sales because there were marginal companies in operation that did not have the down payment and didn't have adequate capacity to buy such a machine, and they might have switched to the leasing program and paid rent to lease a machine, and I think as it later developed Prentice got into the leasing business when they

(Testimony of William P. Hutchison.)

saw the potential that was available in the leasing program as against ownership. [336]

Q. (By Mr. Dezendorf): What period of life is usually estimated for depreciation on plywood machinery, Mr. Hutchison?

A. It has been my experience that the life of the equipment that is purchased in the plywood industry could vary substantially as to the length of life and length of service depending upon the piece of equipment involved. I think that the more substantial items such as driers and lathes can last maybe twenty years and higher as far as average age. I think there are multiple other pieces of equipment which might have lives varying from ten to fifteen, twelve years, but it would be my opinion, that there would be a life of no less than ten years on a piece of plywood equipment.

Q. On this basis, what would be the potential market for selling replacement Raimann machines to the trade?

A. If ten years were used as the life of a Raimann machine, there couldn't be any replacement sales made until 1960 because they didn't start until 1950 in selling this product; however, as Mr. Tom Prentice testified, if five or six years is probably the life for this machine, there still couldn't be any substantial replacement sales until 1956.

Q. During the years the Prentices were in operation they organized two separate companies, the E. V. Prentice Company, Limited, in Canada, and the Prentice Machine Works, Inc. What is the ef-

(Testimony of William P. Hutchison.)

fect of these separate organizations on the over-all earning power and development of the company?

A. Well, these two companies were organized separately for various reasons, presumably, possibly for income tax purposes or for——

Mr. Kolisch: I am going to object to this line of interrogation.

The Court: Why?

Mr. Kolisch: What does he know about why they were organized. He can testify concerning the figures that he has seen. Is he an expert in our business? Is he going to testify as to how they organized or what the potential was or anything concerning——

The Court: I am not concerned as to why they did it, but I do think it is important to determine the profit. If, in fact, the earlier company did take care of the Canadian market and then if they organized another company to operate in Canada, then the facts concerning the Canadian company are relevant, but I will sustain the objection as to the reason for the organization of the company.

Mr. Dezendorf: I was just trying to get at the effect that those two had on the parent company.

The Witness: I don't know the reasons these companies were organized, obviously. One was organized in September, 1951, the Canadian company, and the Machine Works was organized in February, 1952. They are separate entities, and they are treated separately *from* book purposes and for [338] all accounting matters; however, in my opin-

(Testimony of William P. Hutchison.)

ion, they are so closely integrated as to direction and ownership so that when you review the operations of the Prentice brothers you have to treat them as an integrated, integral unit, the three companies.

Q. Mr. Hutchison, do you believe that the sales of the two companies that were formed later would have completed business that would normally have gone to the original partnership, E. V. Prentice Machinery Company?

A. Yes, I think that is true. I think that the Canadian company completed sales of Raimann patchers that--as a separate organization—would normally have been sold through the Portland company as a branch office up there or through some sales representative. I think those sales normally would have been made by the Portland company. The Prentice Machine Works, Incorporated, sells, its sole outlet. everything it makes goes through the Portland company, E. V. Prentice Machinery Company, and it is actually manufacturing some products under the trade name of Victor which the E. V. Prentice Company formerly used to sell for other manufacturers on a commission basis so I do feel there is a definite correlation between the activities of those companies as to completing business that normally was done by the other company.

Q. Did you find any record of any of these separate companies hiring outside, additional salesmen?

A. No, in reviewing all information on pay roll, [339] and in every inquiry that we made we did

(Testimony of William P. Hutchison.)

not find any record of their hiring outside salesmen for any of the three companies. There was, however, a manager in the Canadian office, and in my opinion it was necessary for the four Prentice brothers—who were the principal salesmen when the company started in 1948, and they are the same four salesmen in 1955—it was necessary for them to allocate and separate themselves and their time over the activities of the three companies, and I saw no effort to expand their sales activity by salesmen even though their duties have been increased during that period.

Q. In your examination of the sales experience of the E. V. Prentice Machinery Company during 1952 did you develop any information to indicate the trend in the early part of 1953?

A. Yes, I prepared an exhibit to show that information, Exhibit 318. I think this exhibit is interesting because it shows approximately three five-month periods and the five-month period before the Smith and Tuck letter of July 22nd.

The five-month period in 1953 after the prior litigation was settled and the interim five-month period of July through December, the second amount shown on the far right side of that schedule is $130,029. Those were the sales realized in the first five months of 1953 by this company.

The first amount, $241,401, are the sales in the five months preceding the July 25th letter so those [340] two amounts are the before-and-after period.

When you take those and add them up and di-

(Testimony of William P. Hutchison.)

vide them by two to get an average of what the company did before and after the letter, you find that the average for those two periods is $185,715.

The actual sales during the five-month critical period were $195,950. In other words, the sales were $10,000 higher than the average of the period immediately preceding the letter and the immediate period after the letter, and it just would indicate to me that there must have been a downward trend in sales activity and market that must have accounted for this trend which started in 1952 and continued on into the early part of 1953 and middle of 1953.

Q. Did you make any determination of the effect, prior to the letter of July, 1952, of the number of Skoog machines that were leased to the plywood industry?

A. I have prepared Exhibit 319. I think that first paragraph that is typed on that schedule does not apply. It was taken off the photo-copy machine, I think, in error.

Yes, we examined photo-copies of the ledger sheets that were prepared by Associated Plywood Mills relating to their lease program on the Skoog machines, and we determined the number of machines that were on lease at the dates shown on Exhibit 319. I think the schedule is interesting for two reasons. It shows that between the years 1951 and '52 there was a reduction of actually four machines in the Skoog program. [341] I think the other pertinent factor is that, obviously, there

(Testimony of William P. Hutchison.)

was no increase in the Skoog leasing business during this critical period because of the prior litigation.

Q. Mr. Hutchison, did you make an effort to determine the penetration of the patcher market that was enjoyed by the E. V. Prentice Company?

A. Yes, this is my last exhibit. It is Exhibit 320. This schedule was made to show coverage or penetration that the E. V. Prentice Machinery Company had in the plywood industry with their Raimann machine, and this information was developed from the Timberman Magazine, the January, 1955, issue in which the number of mills—and this is of December 31, 1954—in which the number of mills in existence were listed by territory, Oregon, Washington, California, Idaho, Montana, and Alaska, and the annual capacity of these mills that were in existence was stated. Then the last four columns have been brought on by us to show the number of mills that had the Raimann patchers, the capacity of these mills that had the Raimann patchers, and then the last two amounts are the integration of percentages to show those amounts in a percentage form.

So as you review those statistics and check the summaries at the bottom, you can see that in all those territories there were Raimann machines in 56.3 per cent of the mills, and the mills that had Raimann machines accounted [342] for 66 per cent of the capacity of the plywood industry on the basis of the information.

(Testimony of William P. Hutchison.)

Q. Mr. Hutchison, what is your analysis of the Prentice performance from July, 1952, on out?

A. In my opinion, from July, 1952, on out, meaning up to date, it is my opinion that the Prentice operations have followed generally the slow down and recession, the slump that took place in sales and business conditions from July, 1950, on. In other words, it took on into 1952——

Mr. Kolisch: Is he now testifying as an expert on business conditions?

Mr. Dezendorf: He is giving his conclusions based upon——

Mr. Kolisch: Has he been qualified to speak of business conditions?

The Court: I will sustain the objection.

Q. (By Mr. Dezendorf): Mr. Hutchison, do you have an opinion as to whether the Prentice performance after July, 1952, was affected by the July, 1952, letter and the lawsuit or whether other factors were responsible for their performance?

The Court: I do not think that that is a proper question to address to an accountant. I think that is the ultimate question that I am going to have to determine, and although at times an expert witness can render an opinion as to the ultimate question, I do not think that Mr. Hutchison's qualifications are such that would permit him to make that [343] determination. I am going to sustain the objection.

Mr. Dezendorf: You may cross examine.

Mr. Kolisch: Your Honor, we would like to have some time before we start this cross examination.

The Court: I do not know why you want time. These seem to be obvious, his statements. There is nothing here, no surprises in a statement of this kind.

Mr. Kolisch: There are quite a few inaccuracies as I am informed by my experts, and we think that something that may be useful to the Court might be developed.

The Court: What kind of information?

(Thereupon, there was discussion off the record.)

The Court: We will take a recess until 2:30 this afternoon. I will give you three hours.

(Noon recess taken.) [344]

Afternoon Session, 2:30 P.M., Trial Resumed

The Court: You may proceed.

Mr. Dezendorf: I wonder if we could interrupt and recall Mr. Scott?

The Court: Yes.

JAMES D. SCOTT

recalled.

Mr. Dezendorf: I might say just as a preliminary that we were able to resolve the problem by eliminating figures and using percentages. We have a hundred per cent for each year and the quarterly per cent of each year within the year and then the percentage of all of the years to each other.

Mr. Kolisch: Mr. Dezendorf gave me these figures and said he was going to offer the percentages. I do not think you can offer for whatever it is

(Testimony of James D. Scott.)

worth. I do not think it is worth anything. I do not think it is admissible. It does not tell us anything of the machinery business they were doing. It just shows certain percentage figures. I think the Court could look at it if the Court wants to, but I do not think it is meaningful, and it does not give us any information by which we can check with anything we know.

The Court: One of the difficulties of an exhibit of this kind is that there is no method by which the plaintiffs can cross examine this witness. [345] If he wanted to divulge the figures, how could they test the accuracy of any of these figures?

Mr. Dezendorf: It seems to me that the percentage is equivalent to a figure.

The Court: Yes, I assume that, but how can Mr. Kolisch cross examine this witness?

Mr. Dezendorf: Well, whether those percentages are accurate, whether they correctly reflect the first quarter, for instance, the percentage.

The Court: Do you think this is admissible?

Mr. Dezendorf: I do.

The Court: Honestly?

Mr. Dezendorf: I honestly do for the purpose of permitting the inclusion upon the chart of the trend line.

The Court: I just want to say to you this, that if this witness testifies as to these percentages, he is going to open himself up to all types of cross examination, and Mr. Kolisch can inquire as to the

(Testimony of James D. Scott.)

figures which were used in arriving at these percentages.

Mr. Dezendorf: I am sure that the witness then would not be willing to disclose the percentages. Am I stating that correctly, if they can ask you on cross examination for the figures?

The Witness: That is my client's restriction.

The Court: I cannot see how I can consider it [346] in any other way. If a witness offers himself for direct examination, the opposing counsel has the privilege of asking him any question he desires in connection with his testimony.

Mr. Dezendorf: May I ask Mr. Kolisch one question then before finally deciding?

The Court: Proceed.

Mr. Dezendorf: Mr. Kolisch, on cross examination if this witness should submit to direct examination on percentages, would you insist upon asking for figures?

Mr. Kolisch: I would.

Mr. Dezendorf: Then we will withdraw the witness. That is all. Thank you very much, Mr. Scott.

(Witness excused.) [347]

WILLIAM P. HUTCHISON

recalled, testified as follows:

Cross Examination

Q. (By Mr. Kolisch): Mr. Hutchison, did you personally go through the Prentice books?

A. I didn't personally go through all of the Prentice books, but I have inspected the general

(Testimony of William P. Hutchison.)

ledgers and some of the sales journals and at Canada and at their Portland office for their two Portland companies, and, as I indicated in my prior testimony, I had three men from my staff in my office who assisted me in this work.

Q. How much time did you personally spend at the Prentice office in Portland? As I understand it, this investigation was over a period of eight months?

A. Yes, our work has been somewhat continuous. We started, I believe, last March or April, and we first were restricted to the records of one company, and then, as I explained, in our later work we had access to the Canadian books and the Prentice Machine Works books and made a second trip out there.

Q. How much time were you out there personally?

A. You mean in percentage or do you mean in number of days or——?

Q. Number of days, if you can tell me.

A. I believe I was out there on three or four occasions in the course of the time the work was [348] completed in Portland, and I spent several days in Canada when the work was done on the Canadian company.

Q. And three or four days in Portland over at the Prentice place? A. Yes.

Q. As I understand it, Mr. Brevig and some other members of your office were doing most of the work?

(Testimony of William P. Hutchison.)

A. Yes, they did a lot of the detail work. There were three other gentlemen.

Q. Was there a full, frank, and complete disclosure to you and your associates of the Prentice books and records, and correspondence I might add also.

A. I would say no at first when we first were turned loose on this particular piece of work.

Q. You mean when you were down looking at the records supposedly of one company?

A. Yes.

Q. What handicap were you under then?

A. When we arrived to do the work for inspecting the accounting records of E. V. Prentice Machinery Company, the general ledgers and the journals and the sales invoices and customer accounts were substantially all that were made available to us when we first went on this piece of work.

Q. That situation was changed when?

A. That situation stayed that way during the [349] course of our first work, and we gradually acquired certain other things such as access to tax returns and access to financial statements as prepared by Mr. McGinnis, but——

Q. Didn't you know—I am sorry——

A. ——in getting some of these things it was a little like pulling teeth for a while to get them in the first piece of work.

Q. You mentioned tax returns. Didn't you know that those had been made available to Mr. Dezendorf when he took the depositions of the Prentices?

(Testimony of William P. Hutchison.)

A. They were not all there, I don't believe, Mr. Kolisch. There was some tax returns that Mr. Dezendorf had there. You are correct in that statement.

The Court: I do not know what is the relevancy of this. Ultimately you got all the books you wanted?

The Witness: Later by a stipulation we got all the books, and we had access to correspondence and other records which we did not have the first time we were there. That is correct.

Q. (By Mr. Kolisch): All these tabulations and records which you have testified to and relating to the plaintiff's business were all based on sales rather than orders of machinery; is that correct?

A. On sales rather than orders?

Q. Yes.

A. Yes, the financial information as we have [350] presented it is based on sales as taken from the companies' books, which is verified by their method of reporting income, accounting for their sales and transactions.

Q. Were the records concerning orders available to you? A. They were not.

Q. At no time they were available to you?

A. They were not available when we first went out——

Q. I am talking about——

Mr. Dezendorf: Please let him finish, Mr. Kolisch.

Mr. Kolisch: I am sorry. Go ahead.

(Testimony of William P. Hutchison.)

The Witness: The order records were not available to us in our first phase of our work, and in the second phase of our work we were told we would not have access to the order book by some person at their company.

Q. (By Mr. Kolisch): Who told you that?

A. It was not told to me. It was told to Mr. Brevig, and I think he was talking to the bookkeeper.

Q. Is that what Mr. Brevig told you?

A. That is correct.

Q. Which you have just now told me?

A. That is right.

Q. Subsequently were you given the order books? A. Not to my knowledge.

Q. You had never had the order books made available to you? A. Never. [351]

Q. Did you ask for them?

A. We thought we asked for them, yes.

Q. Did you ask for them?

A. Yes, we did the first time we were out, and we were not given access to them, and I have just testified we asked for them the second time.

Q. Who did you ask the first time?

A. I don't know who we asked. I wasn't there that first time. I presume Mr. Brevig discussed it with either the office manager or one of the Prentices.

Q. Did you know that the Court had entered an order that we were to make all our records and books available to you?

(Testimony of William P. Hutchison.)

A. Are you speaking of the stipulation?

Q. Yes, the defendants came before this Court to demand that.

A. Yes, I have a copy of it.

Q. After that date were you denied any books or records concerning orders?

A. I just testified to that statement through Mr. Brevig from the bookkeeper at Prentice.

Q. Did you ever—did you or Mr.——

The Court: I do not think that there is any useful purpose going to be served by this type of interrogation. The witness has already testified that he prepared his statements from the sales. Your witnesses have testified that they used the orders. What difference does it make if he was refused [352] them or not refused them?

Mr. Kolisch: Of course, it is a reflection, certainly, on us if they were refused and the Court had entered an order, and, secondly, of course, we think that the orders are material.

The Court: I do too, and I have told you that, and I have told you from the beginning of the trial what I am interested in and yet I get everything but what I am interested in. I get the history of the industry but nothing about what I want. I do want the orders. Why don't you put them in on your case?

Q. (By Mr. Kolisch): Do you know from your examination of the books whether there is any time lag between orders and sales?

(Testimony of William P. Hutchison.)

A. Yes, we came across information that would indicate there is a lag.

Q. Do you have any idea how much?

A. I think it would vary on the type of machinery and the product that was involved. We have seen correspondence on delays in shipment and on order dates and on delivery dates in the correspondence files.

Q. Do you know that sales which you recorded as taking place in the latter half of 1952 were not the results of orders taken prior to July of 1952?

A. I don't know that of my own knowledge, but I believe it would be possible that that could have taken place. [353]

Q. Looking at Defendant's Exhibit 308, does this figure appearing in the first column of figures, $368,906 sales, doesn't that represent a substantial number of orders taken months before?

A. Are you talking about our exhibit?

Q. Yes.

A. Oh, I thought you said plaintiff's.

Q. No, D. X. is yours.

A. Would you repeat the question?

(Last question read.)

A. I believe that same of those sales could have taken place in prior months. I would like to just state one thing, that while order dates have their importance as far as correctly reporting income from an accounting presentation, the way in which we found the books was our understanding of good accounting practice for such reporting when the

(Testimony of William P. Hutchison.)

sale is actually delivered and when the costs are finally incurred. At the order date you merely have the deposit and no basis for putting in any amount of the transaction, say, so that it is very possible that those sales in January and February could have originated from orders prior to the first of the year even.

Q. Your testimony with respect to Exhibit 308, as I recall, it was that it shows a decline had begun in plaintiff's business after February of 1952, and I believe you volunteered the statement that the reason for this was not the Smith and [354] Tuck letter of July 25th and that therefore that letter was not material in view of this decline which you said had taken place before. Now, if it could be shown that, in fact, there was a decline in the orders right after July of 1952, wouldn't you consider that significant?

The Court: I thought you objected to this man giving this type of testimony and I sustained your objection.

Mr. Kolisch: That was with respect to business conditions, your Honor. I am just asking him now with respect to his study of our own books.

The Court: I might say that whatever he says is not going to make one bit of difference to me.

Mr. Kolisch: I shall skip the question then.

The Court: I might tell you, Mr. Kolisch, that you do not have to waste any more time on the question of the lag between the order date and the date upon which the sale is recorded. Mr. Tom

(Testimony of William P. Hutchison.)

Prentice testified at length about that. He testified he has never gotten a sale the first time he went into a customer and that there always is a lag between the time the order is taken and the time the sale is recorded.

Mr. Kolisch: Yes, your Honor.

Q. Now, will you look at Defendant's Exhibit 316? That is this chart. Was that chart prepared on the basis of sales of each company or on orders?

A. It was prepared on the basis of sales, as it [355] states at the top, quarterly sales for those years.

Q. I am sorry, I did not see it. You said it states it up there?

A. I think it is typed at the very top, "Quarterly Sales 1950-1955."

Q. Were you here when Mr. Conway testified yesterday? A. No, I wasn't here.

Q. You do not know then that he testified that, so far as the Coe Company is concerned, the figures that he showed me were for orders?

A. I didn't hear the testimony, Mr. Kolisch.

Q. Did you prepare these charts from the figures corresponding or taken from Defendant's Exhibits 214 and 215?

A. I don't know that I have seen those other exhibits.

Q. Show them to him.

(Documents referred to presented to the witness.)

Q. Were those the figures you used?

(Testimony of William P. Hutchison.)

A. I believe these are the figures that we used. I would have to check it to be sure or ask my office, but I——

Q. Who prepared the chart, Mr. Hutchison?

A. These charts?

Q. Yes.

A. Oh, we have had several different people in our office working on that for the last few days.

Q. You did not prepare them?

A. I helped in the preparation of them, supervised the preparation of them. I did not draw the lines.

Q. I didn't expect you would, but do you know whether or not you used the figures shown on those two exhibits?

A. It is my understanding that these are the sales figures and that these are the figures that are used on our graph.

Q. You are not sure whether they are sales figures or order figures with respect to Coe, I take it?

A. Well, it is my understanding that when we secured this information we asked for sales figures by quarters because we have not been particularly concerned in getting this order information in our presentation.

Q. Do you know anything about the commission business, Coe's? A. Commission business?

Q. Yes, you do not know anything more than you were handed there, I think?

A. These are sales; these are not commissions.

Q. I thought they were commission sales?

(Testimony of William P. Hutchison.)

A. My understanding of a commission sale is possibly different. A commission sale is where you receive a net commission on income reflecting the sales and your records. These I took to be sales.

Q. You had no information other than supplied to you in the form of those two exhibits?

A. That is correct. This is the only information [357] that was given to us by Coe.

Q. Did people in your office who worked on these charts get their information also from those two exhi' ts? A. That is the only place.

Q. That is the only two pieces of information you had? You did not have access to their books?

A. Oh, of course not, no.

Mr. Kolisch: That is all.

The Court: That is all.

Mr. Dezendorf: That is all.

(Witness excused.) [358]

RAYMOND J. MARTIN

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dezendorf): Mr. Martin, where do you reside?

A. I reside at Roseburg, Oregon.

Q. With what company are you connected?

A. Martin Brothers Box Company.

Q. In what capacity?

A. Well, I am Assistant Treasurer or Secretary.

(Testimony of Raymond J. Martin.)

Q. How long have you been connected with the Martin Brothers Box Company?

A. I have been connected with the company for over eight years now.

Q. Mr. Martin, prior to July, 1952, did your company at Oakland have a Raimann veneer patching machine?

A. I don't know the exact dates, but we did, we were one of the first plants to have a Raimann machine on the West Coast.

Q. Do you remember at the time you had a Raimann machine that you received a letter from Smith and Tuck on behalf of Associated on July 26, 1952? A. We certainly did.

Q. At the time that you received that letter did [359] your company have under consideration purchasing any more machinery from the Prentice brothers? A. We did.

Q. What type of machinery had you in mind purchasing at that time?

A. Well, of course, we are always open to the various types of machinery that Prentice handles, and at that particular time I think we were dealing primarily with more Raimann machines.

Q. What, if anything did you do with respect to your negotiations for more Raimann machines at the time you received this Smith and Tuck letter of July 25, 1952?

A. Of course, no company likes to receive letters saying cease and desist from using machinery, whatever the letter states. We held up tentatively

(Testimony of Raymond J. Martin.)

any further purchases until we saw better what the situation was going to result in.

Q. Were you later advised of the termination of the suit in November of 1952 in favor of the Prentices? A. We were.

Q. What, if anything, did you do thereafter with respect to purchasing the Raimann machines that you had in mind purchasing in July, 1952?

A. The exact date I am not sure, but we purchased three additional machines.

Q. Was it very shortly after the termination of that suit?

A. That I wouldn't say offhand, no. [360]

Q. Did you buy as many machines after the suit was over as you had in mind buying before you got the Smith and Tuck letter? A. Yes.

Q. Was there any other machinery that you had in mind purchasing from the Prentices that you did not buy from them?

A. I don't think that would have changed our mind. The Smith and Tuck letter referred to the Raimann machine only.

Q. You didn't buy any other machinery from anybody else because of the Smith and Tuck letter?

A. I would say no.

Mr. Dezendorf: You may cross examine.

Mr. Kolisch: No cross examination.

(Witness excused.) [361]

GENE C. BREWER

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dezendorf): Mr. Brewer, where do you live? A. Redding, California.

Q. With whom are you connected?

A. United States Plywood Corporation.

Q. How long have you been with the United States Plywood Corporation?

A. About 19 years.

Q. What duties do you specifically perform?

A. Right now I am in charge of our Pacific Coast manufacturing plants.

Q. To your knowledge, did the United States Plywood Corporation have in any one of its plants a Raimann machine prior to July, 1952?

A. I am not sure about the date. We had a Raimann machine in our Algoma, Wisconsin, plant some time during that period, but I don't know the exact date.

Q. When were you first contacted by the Prentice brothers with respect to the purchase of additional Raimann machines?

A. Well, if you state that a little differently, I was first contacted in July of 1953 in regard to [362] purchasing Raimann machines but not additional Raimann machines because we hadn't bought any, hadn't seen any at that time.

Q. So the first time you were contacted in an

(Testimony of Gene C. Brewer.)

effort to expose you to the Raimann machine was in July, 1953; is that correct?

A. That is correct.

Q. Since your company in 1952 had one Raimann machine, why didn't you buy the other ones?

A. Well, our first knowledge of the Raimann machine actually came in 1950. That is the first knowledge we had that there was such a machine. At that time it was being handled by a company in New York, the Henry Wiegand Company I believe was the name of it, and I was advised that there was such a machine and that we as a company might have some interest in it. We had no further contact on the West Coast about this piece of equipment until July, 1953, when I had a letter from Dave Prentice. During that period we had knowledge that our Algoma factory had taken one of these machines in on a trial proposition, and they had elected to keep it and were using it to plug core for their hardwood production, and I have no recollection of having any letters or records about what happened at Algoma except I did know that they continued to use it.

Q. Did your company delay buying any Raimann machines because of the Smith and Tuck letter of July 26, 1952, or the [363] lawsuit that ensued thereafter?

A. Well, strangely, I didn't know there was such a letter. We were not notified of such a thing.

Mr. Dezendorf: You may cross examine.

(Testimony of Gene C. Brewer.)

Cross Examination

Q. (By Mr. Kolisch): In 1950 or '51 or '52 would any of your plant superintendents have told you if they had been called upon by the Prentices to sell them machines?

A. At that time my job was the general manager of our Shasta operation, and I had no jurisdiction over our Oregon or Washington plants.

Q. You would not have known what happened in your other plants, would you? A. No.

Mr. Kolisch: That is all.

Mr. Dezendorf: That is all, Mr. Brewer.

(Witness excused.)

Mr. Dezendorf: The defense rests.

The Court: Have you got all the exhibits you want in?

Mr. Dezendorf: By the way, I think I neglected to offer the 300 series, and I now offer them.

The Court: Are those listed?

Mr. Dezendorf: They are the ones that Mr. Hutchison brought. We numbered those starting at 300. [364]

The Court: All except the one that Mr. Scott was to testify concerning, 321 and 322?

Mr. Dezendorf: That is back here now.

Mr. Kolisch: How about the chart, your Honor, 316? We object to that.

The Court: Objection overruled. I know what it means. The line of Prentices refers to sales. The line of Coe refers to orders so with that understanding we will just leave it in here. I am not

placing very much credence on graphs and charts.

(Charts heretofore marked for identification as Defendant's Exhibits 301 to 320, inclusive, were thereupon received in evidence.)

The Court: Proceed.

Mr. Kolisch: Call Mr. Workman. [365]

NORMAN A. WORKMAN

recalled for rebuttal testimony, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kolisch): I am going to hand the witness Plaintiff's Exhibit 87.

The Court: Do I have it?

Mr. Kolisch: No, it is a new exhibit that we prepared based on material that is already before the Court.

Q. Mr. Workman, will you please tell me what you did here in Plaintiff's Exhibit 87?

A. Well, this presents in tabular form the same information which has already been presented on certain lines on a graph that Mr. Bloch's office has presented to the Court, but these figures are based upon my analyses of sales of the Prentice Company, and after analyzing the sales for the machines involved I have then traced the orders which started those sales to attempt to determine the date that the order was taken by the Prentice Company, and this schedule then presents the sales of the Prentice Company based upon the order date of orders which were finally consummated as sales.

Q. You are covering what periods?

(Testimony of Norman A. Workman.)

A. This schedule, Exhibit 87, just covers the period from August, 1951, through July, 1953. In other words, it represents the twelve months prior to the Smith and Tuck letter and the twelve [366] months subsequent to the Smith and Tuck letter.

Q. Where did you get these figures?

A. These figures came from the accounting records of the Prentice Company.

Q. Are they accurate, to the best of your knowledge?

A. To the best of my knowledge, they are accurate figures.

Mr. Kolisch: You may examine.

Mr. Dezendorf: No questions.

Mr. Kolisch: I will offer Plaintiff's Exhibit 87. I am sorry, I forgot to offer it.

The Court: It is admitted.

(Document, Schedule of Orders Received for Machines above referred to, previously marked Plaintiff's Exhibit 87 for identification, was received in evidence.)

Mr. Kolisch: That is all.

(Witness excused.) [367]

TIMOTHY F. MAGINNIS

recalled for rebuttal testimony, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kolisch): You heard—or did you hear Mr. Hutchison's testimony relating to the Canadian company of E. V. Prentice?

(Testimony of Timothy F. Maginnis.)

A. Yes, I did.

Q. Do you have any comments concerning the relationship between the Canadian and the United States company?

A. I have this comment to make, that prior to the formation of the Canadian company there was no machinery sold there, to my knowledge, in Canada.

The Court: When was the Canadian company organized?

The Witness: It was organized in October of 1951. Am I correct on that?

Mr. Kolisch: Yes.

Q. Why was this Canadian company formed, Mr. Maginnis?

A. There are probably a number of reasons that contributed to it. As of the major decision to embark on this Canadian venture, I think it was primarily an effort to expand their business.

Mr. Kolisch: That is all. You may examine.

Mr. Dezendorf: No questions.

The Court: Did you hear the testimony of Mr. Hutchison that for the year 1952 instead of [368] showing expenses incurred as opposed to sales for a particular month in accordance with the books, that the exhibits introduced into evidence changed that and showed that for that year alone the orders were recorded in a particular month, and the expenses for that month were allocable or allocated to those orders?

The Witness: Yes, I heard him say that.

(Testimony of Timothy F. Maginnis.)

The Court: Are you the one that did that?

The Witness: He was referring to the statement for the Prentice Machine Works. Yes, I did that, your Honor.

The Court: Why did you do it for the year 1952 and not for any other year?

The Witness: To be perfectly candid about it, I did not work it out for the other two years, your Honor. We were primarily concerned with the effect of the Smith and Tuck letter on the business of that particular year.

The Court: Wasn't that a kind of misleading exhibit where you show for one year orders and for all the other years sales?

The Witness: There were two other years involved. There are three years, your Honor. There was a footnote calling your attention to that on the statement.

The Court: What exhibit is that?

Mr. Kolisch: That is Exhibit 58, your Honor.

The Court: Did you keep the tax records of the company on the basis of sales and expenses or orders and expenses? [369]

The Witness: On the basis of sales. We analyzed the sales at that time to determine which ones had been—were in process in the plant prior to the Smith and Tuck letter.

The Court: Did you regard it as good accounting practice to show sales, to record the sales rather than orders?

(Testimony of Timothy F. Maginnis.)

The Witness: It was not a question of accounting practice. It was a matter of stating the presentation to reveal that and footnote it to indicate it. It was, we felt, important that you had that information on what orders were received before the Smith and Tuck letter and what orders were received afterward.

The Court: Why didn't you show it for the following year then if you thought that that was important?

The Witness: To be perfectly frank about it, the presentation, as I say, was footnoted to call your attention to it, and I was instructed by our attorney to show it in that manner. As to the other two years, since from then on we were trying to get back into operation, I firmly believed that the sales would have followed the orders very promptly. The second footnote there indicates that at the end of the second six months there were practically no unfilled orders so from there on our sales and orders would be practically synonymous.

The Court: You mean after March of 1953 whenever an order was taken it was filled practically immediately?

The Witness: Yes, I think perhaps some of the [370] Prentice partners could tell you that better than I, but I know that the plant was working at a slow gait for a little while there until recently, until 1955, which is not presented in this statement at all.

The Court: You mean a person would order a

(Testimony of Timothy F. Maginnis.)

Raimann machine, and the next day he would get it?

The Witness: Well, no, I won't say that, your Honor.

Mr. Kolisch: Your Honor, may I straighten you out. The Raimann machine is not made by the Machine Works.

The Court: I know that.

The Witness: No, there would be a time lag, but it would be very prompt.

Mr. Kolisch: I thought you were looking at the Machine Works statement, your Honor, when you said they order Raimann.

The Witness: No, they would fill the order just as promptly as they were able, your Honor.

The Court: But prior to that time it would take them a considerable time?

The Witness: Yes, prior to the Smith and Tuck letter they had an order file of the machine.

The Court: Did you do the same thing with reference to the E. V. Prentice Machinery Company as you did with Prentice Machine Works, Inc.?

The Witness: No, I did not, your Honor. The information on orders was much more complex and [371] not adaptable to that type of presentation. The statement that I presented as to the E. V. Prentice Company was in accordance with the books. The cost of sales data I have there is in accordance with the books. The rateable—I forget their terminology, I don't have it in front of me now—but their revising of figures that they did was

(Testimony of Timothy F. Maginnis.)

not in accordance with the books but in accordance with their point of view.

The Court: In the exhibits prepared by the plaintiff the commissions are included with other machinery rather than a separate item; is that right?

The Witness: No, they are included as a separate item, your Honor, on E. V. Prentice Company in our statements.

The Court: In the exhibits that have been admitted?

The Witness: Yes, the commission income shows below the gross profit on sales as a separate item.

The Court: I may have the wrong ones. That is all.

(Witness excused.)

Mr. Kolisch: Call Mr. Bloch. [372]

IVAN BLOCH

recalled for rebuttal testimony, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kolisch): Mr. Bloch, did I ask you to prepare in a chart form the wholesale price index of the industry from 1950 to 1955?

A. Yes, you did, Mr. Kolisch.

Q. Do you have that?

A. Yes, Mr. Kolisch.

Q. Do you have a copy there before you?

A. Yes, sir.

Q. Before we discuss this item, I am wonder-

(Testimony of Ivan Bloch.)

ing, Mr. Dezendorf, will you stipulate that—first, I will ask the witness—did you prepare this chart from the wholesale price index as reported by the United States Department of Labor, Bureau of Labor Statistics?

A. Yes, sir, and I have the actual figures here in case you wish them.

Q. We will mark this Plaintiff's Exhibit 88.

(Graph, Wholesale Price Index, marked Plaintiff's Exhibit 88 for identification.)

Q. Looking at this chart, Mr. Bloch, and also bearing in mind Defendant's Exhibit 316—that is this chart (indicating) — is there any correlation that you can see between the price of plywood and the sale of machinery? [373]

Mr. Dezendorf: I would object to that for the reason and upon the ground that this man is not an expert in this business. He is merely testifying from two graphs which, if numbered, anybody can look at and see what the sense is, and it does not take his comment to explain it.

The Court: I do not see to what he needs to testify. I can look at it myself.

Mr. Kolisch: Well, your Honor, the question of correlation I don't believe is quite as simple——

The Court: He admits that he is not a statistician. That is what Mr. Davidson told me, what Mr. Nikoloric said he had Mr. Davidson for.

Mr. Kolisch: I beg your pardon.

The Court: You did not qualify him as such.

(Testimony of Ivan Bloch.)

Mr. Kolisch: That is correct, your Honor.

Q. Mr. Bloch, have you made a study to determine what the business conditions were in the Northwest during the year 1952?

Mr. Dezendorf: Is that general or limited to the plywood business, Mr. Kolisch?

Mr. Kolisch: It is a general question.

Mr. Dezendorf: I would object to it for the reason and upon the ground I don't think it is relevant.

The Court: I am going to let him testify as to that. I cannot determine that by looking at two charts. [374]

The Witness: Mr. Kolisch, in my business we have to keep constantly informed as to business conditions in the Northwest and other places. As a means of keeping ourselves informed on business conditions, we refer to a number of indices of business activity, particularly one prepared by the University of Washington School of Business Administration and published by that university on a regular basis. In looking at the charts and the figures which that university prepares and which is recognized by all business groups, we keep informed as to the general business conditions.

Q. (By Mr. Kolisch): From your information as of the period 1952 can you tell us what business conditions were over that period of time?

A. During the first half of the year, of course, the activity varied as it does in any business from month to month, but the general trend during the

(Testimony of Ivan Bloch.)

first half of the year was downward, and from there on it moved on sharply upward.

Q. Starting up when?

A. Starting about May.

The Court: That is general business conditions?

The Witness: That is correct.

Q. (By Mr. Kolisch): How about the construction business?

A. Nationally, and I would have to refer to it this way because there are no good figures in the Northwest——

Mr. Dezendorf: If the Court please, I would object. It is too remote. [375]

Mr. Kolisch: I do not think it is remote at all. Everybody knows that plywood is tied to construction.

The Court: Yes, but it is not tied to construction on the Pacific Coast. The plywood business is a National business, and if he wants to give figures on what the National construction is I think it is relevant, very relevant.

Mr. Kolisch: Very well, proceed.

The Court: Do you have National figures?

The Witness: Yes, your Honor, I have.

The Court: Give the National.

The Witness: By reference to a publication by the United States Department of Labor, Department of Commerce, entitled "Construction Review," there is therein a chart on page 16 relating to new construction put in place based on 1947-49 prices which shows that from the period 1952 onward new

(Testimony of Ivan Bloch.)

construction was in an upward-growing manner, very steeply so.

The Court: What month?

The Witness: I beg your pardon, your Honor?

The Court: What month?

The Witness: This is not broken down in months. This is by the year, but the curve is a smooth one according to these figures.

The Court: According to the graph that you are looking at, in 1952 the construction was high as [376] compared to 1951 and 1953; is that right?

The Witness: That is correct, it went right on up.

The Court: It went up?

The Witness: That is correct. Let me explain if I may, your Honor. In 1950 new construction declined through 1951 and 1952. Then it rose and exceeded the previous low of 1950.

Q. (By Mr. Kolisch): How about 1953?

The Witness: The same thing; went on up.

The Court: Do you have the figures on the machine-tool industry?

The Witness: I do not have them here, your Honor. I don't know whether those—they would not be in this particular publication although we would be very happy to get them if you desire.

The Court: Isn't it often said that the real index to employment and to the economy is to be found in the level of production as far as machine tools are concerned?

The Witness: You cannot take any single index to arrive at that, and I do not believe that the

(Testimony of Ivan Bloch.)

machine-tool industry is the controlling index, your Honor.

The Court: But isn't it one of the best?

The Witness: It is one of the indices.

The Court: That is all.

Mr. Kolisch: You may examine. [377]

Cross Examination

Q. (By Mr. Dezendorf): Mr. Bloch, referring to your Exhibit 88——

Mr. Kolisch: I forgot to offer Plaintiff's Exhibit 88.

The Court: Plaintiff's Exhibit 88 is admitted.

(Graph previously referred to and previously marked Plaintiff's Exhibit 88 for identification was received in evidence.)

Q. (By Mr. Dezendorf): With respect to 88, if I interpret it correctly the price of plywood as of the end of 1951—no, as of July, 1951, was higher than it has ever been since?

A. That is correct.

Q. There was an extreme break in the market in October, November, and December, 1951?

A. I would answer that by saying for the period represented that was the sharpest break.

Q. The answer to my question is "yes"; is it not?

A. Yes, when—could I have the question again, please?

Q. Yes.

(Last question read.)

(Testimony of Ivan Bloch.)

The Witness: Yes.

Q. (By Mr. Dezendorf): According to these figures, for the year 1952 the only real break in the market that it shows occurred commencing in October of 1952; is that correct? [378]

A. That is right.

Q. Mr. Bloch, are you familiar with the Timberman and the annual review it makes of the plywood industry each year?

A. Yes, sir, I have got copies of them right here.

Q. Are you aware of the fact that the Timberman reports that there were two breaks ahead of October, one in the late spring and the other in the early summer?

The Court: From what page are you reading?

The Witness: It is page 65, Mr. Dezendorf.

Mr. Dezendorf: I do not have the page reference. Do you find where it says, "In the late spring and early summer"?

A. Yes, sir, would you care to have me read it?

The Court: Go ahead and read it.

Mr. Dezendorf: Read it.

The Witness: This is part of the Timberman's "22nd Plywood Review" published January, 1953, under the paragraph headed "Production Slowed Twice During the Year."

"In the late spring and early summer new business fell off, at least in part, in reaction to the earlier rush of business. Sales picked up slightly toward the end of the summer and early fall,

(Testimony of Ivan Bloch.)

strengthening further as the year drew to a close. By late December both production and sales, which were about synonymous since no inventories are carried in the mills, were slightly higher for the first eleven months of 1952 than the same period a year before."

Mr. Dezendorf: Would you read the next paragraph.

The Witness: "However the picture was marred by a price break the last week of October but squeezed producers between the new lower price level and higher lumber and raw material costs. Although the slump came at about the same time as the break in the fall of 1951, it was not as sharp, and apparently distributor inventories this year were at far lower levels than at the same time in 1951. The industry, however, was up against old-line economics with general production above sales, prices down while costs remained high. Profit margins faded, and there was a general condition of 'profitless prosperity' with many industry leaders feeling that prices had hit rock bottom as the result of mounting production costs which were quoted as about $5 thousand during 1952. In many plants the work hours were reduced from [380] 48 to 40 hours, while shifts were cut back from six days to five, and in some cases five days to four. By late December some strength had returned to the market and prices edged upward."

Mr. Dezendorf: That is enough for my purposes unless you want to read more.

(Testimony of Ivan Bloch.)

The Witness: I would.

Mr. Dezendorf: Go ahead.

The Witness: "However, shipments generally, ran five per cent ahead of 1951 and sales maintained their lead for the whole year. The industry thinking was to meet the situation with cost cutting on the one hand and increased sales promotion on the other."

Q. (By Mr. Dezendorf): Are you also familiar with the fact, Mr. Bloch, that the major well-established concerns in the industry reported profits less in 1952 than they were in 1951?

A. No, I do not know that.

Q. I think you will find that on page 106.

The Court: I am not really interested in what the Timberman says. I am interested in the statistics that come out as the United States Department of Labor statistics are good statistics, but I am not interested in what the editor of the Timberman [381] has to say. He is not here for anybody to interrogate him.

Mr. Dezendorf: No further questions.

Redirect Examination

Q. (By Mr. Kolisch): Mr. Bloch, did you as a result of a question that his Honor put to you provide any chart with respect to the machine-tool production?

A. Mr. Kolisch, I did consult the "Survey of Current Business," a publication of the United States Department of Commerce for February, 1953, the annual review, and although this does not

(Testimony of Ivan Bloch.)

designate machine tools as such it includes them in durable goods and construction output and shows a chart showing an upward rise after the middle of 1952.

Mr. Kolisch: That is all.

Mr. Dezendorf: No questions.

The Court: After the middle of 1952?

The Witness: Yes.

The Court: I would like to see it.

Mr. Kolisch: Call Mr. Thomas Prentice.

(Witness excused.) [382]

THOMAS H. PRENTICE

recalled for rebuttal testimony, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kolisch): Mr. Prentice, what was the biggest single sale—at what period did you ever make the biggest single sale to Harbor Plywood?

A. We made our largest sale to Harbor Plywood in the fall of 1951, concluding in the spring of 1952. The sales work on it started right around in October, 1951, and in November, I believe it was, in 1951, they ordered a steam-engine drive for a big core lathe that they were adding to their plant. It was about a hundred-thousand-dollar-plus installation for additional manufacturing facilities in the plant. We sold them on a combination sale of November and of February — November, 1951, and February, 1952, we sold them about, oh, somewhere over $33,000 worth of material that they

(Testimony of Thomas H. Prentice.)

needed in this hundred-thousand-dollar installation.

Q. How many patchers does a plywood plant —Raimann patchers—does a plywood plant producing for an ordinary jobber file need, from your observation and information?

The Court: How many patchers does who need?

Mr. Kolisch: Does a plywood plant producing for an ordinary jobber file, how many could it use per million feet of production of plywood per month? [383]

Mr. Dezendorf: I would object to that for the reason and upon the ground that it is not material to any issue involved in this case.

The Court: I will listen to it anyway. Objection overruled.

Mr. Kolisch: I would like to make the point on that, I think it is very material, your Honor, because there is a lot of testimony that there are so many plants, and, I don't know, 54 per cent, I think, have patchers just as good as one plant, and one patcher does not mean they do not need six or seven more, and I think it is important that the witness——

The Court: Are you contending that the reason why a plant only buys one of them instead of six is that the Smith and Tuck letter was written?

Mr. Kolisch: Yes, that might have interfered with it substantially. In other words, your Honor, the presentation of certain exhibits were to the effect that the market was saturated.

The Court: I do not believe that either.

(Testimony of Thomas H. Prentice.)

Mr. Kolisch: You do not have to answer the question.

Q. Have you heard considerable testimony here during the last few days concerning sheathing and the development of the sheathing market over the years? A. Yes. [384]

Q. Do you have any experience in that?

A. Yes, I do, quite a bit of experience, not in the manufacture of it but in the sale of equipment to manufacturers.

Q. What experience do you have with respect to the sale of machinery relating to sheathing manufacture?

Mr. Dezendorf: If the Court please, I think this is improper redirect, and I object to it for that reason because the only proof that the defense put in was that veneer patchers as distinguished from all other machinery were not in common use in the sheathing industry until the end of 1953. I do not think this meets that point.

Mr. Kolisch: Well, they sell a complete line of machinery——

The Court: I am not concerned with when a piece of evidence comes in. I am interested in evidence that I regard as important no matter when it is offered. Objection overruled. Answer the question.

The Witness: Well, sheathing has always been perhaps by other classifications, but it has always been with the industry. It is the normal downfall

(Testimony of Thomas H. Prentice.)

of grades that could not be graded out at any higher grade. I think at one time it was classified as an industrial grade. Sheathing came into its own mainly when the F.H.A., I believe was one, were permitted to use sheathing grades that underlaid floors and the exteriors of houses, things like that, and roofing, with the result that the plants found it more profitable at times to produce [385] sheathing than to produce grades. Now, of course, recently we have had the inclusion into the industry —and which has swollen the industry output up considerably—of sheathing plants that organized themselves to produce nothing but sheathing. They distinguish themselves from the old-line plants, the regular standard plywood plant, in that they are designed to develop nothing but a sheathing grade. That is the only market they go after and the only type of production that they produce. Now, we have seen a great deal of those go into operation here in the last few years. Prior to their advent into the field, many of the old-line plants that had the ability to produce grade or sheathing would produce sheathing when the sheathing market was in good shape to consume this low-grade specie of the log that they would be able to buy and produce on this lower-grade price market.

The Court: Mr. Prentice, do you disagree with the statements made by Mr. Daniels?

The Witness: In what way, your Honor?

The Court: That at the present time sheathing constitutes about 25 to 30 per cent of the market

(Testimony of Thomas H. Prentice.)

but in 1951 or '52 it was about 10 per cent of the market?

The Witness: Well, I mean I don't disagree with him, no, your Honor, except that as sheathing has increased so has the grade plywood. It isn't that the grade plywood remained at a certain level and sheathing walked in and took [386] away a portion of it.

The Court: I do not think that was the testimony. No, I think that the testimony was that a great portion of the increase, however, has been in sheathing where they used it only 10 per cent. Now they are doing 25 per cent, but that does not mean that the other types of plywood remained stationary. They may be increasing also.

The Witness: Well, you see, in my way of thinking, of course, I look at one type of plant that can produce grade and sheathing or another one that can produce sheathing only, and the advent of the sheathing mills, of course, presented to us a big potential of machinery sales.

Q. (By Mr. Kolisch): How many of your machines do you sell to sheathing mills?

A. Sheathing mills of about three or four million capacity will normally use about three of our machines.

Q. What machines are you talking about?

A. Raimann machines.

Q. How about other machines?

A. On other machines to complete the dry-in line that would constitute the glue mixers, glue

(Testimony of Thomas H. Prentice.)

spreaders, driers, core saws, skinner saws, trimmer saws, jointers, tapers, a considerable amount, I mean, to put a sheathing plant in costs a man in excess of $250,000.

Mr. Kolisch: That is all. You may examine.

Mr. Dezendorf: No questions.

The Court: You say that in September or October of 1951 you sold to Harbor in excess of a hundred thousand dollars?

The Witness: No, sir, I say that we sold them in excess of thirty-three thousand dollars on this hundred-thousand dollar project. The whole project to put a core lathe installation in a mill runs about a hundred thousand.

The Court: When did you sell to them?

The Witness: We started negotiating those sales in October, 1951. We sold the steam engine. Because of the long delay on steam engines, we took the order for that in November, 1951, then took the order for the lathe in February, 1952. I think that the sale was committed, I think we committed the factory in about January, 1952, and then formalized it in February. There is a contract and signatures and everything that takes a little more time than normal.

Q. (By Mr. Kolisch): With respect to Martin Brothers Box Company, how many Raimann patchers did you sell them and when?

A. We sold them four Raimann patchers. The last one was delivered in February, 1952. We sold them three in 1951. They started up with one early

(Testimony of Thomas H. Prentice.)

in the year. They got two more in about a little after the year. Then they got the fourth one in the early part of 1952. [388]

Mr. Kolisch: That is all, plaintiff rests.

(Discussion off the record.)

Mr. Dezendorf: If the Court please, we think we may want to call one more witness, and I am wondering if we could have about twenty minutes to try to get him here.

The Court: To what is that witness going to testify?

Mr. Dezendorf: The witness is going to testify that the Port Orford business that Mr. Prentice testified about in 1952, that they abandoned their plans to put in a plant then and that it was not built until 1955.

The Court: They did not bring in any evidence anyway on that so there is no use bringing in evidence on it.

Mr. Dezendorf: Very well. Then we rest.

(Trial concluded.)

[Endorsed]: Filed March 7, 1957.

[Endorsed]: No. 15475. United States Court of Appeals for the Ninth Circuit. E. V. Prentice Machinery Co., and Prentice Machinery Works, Inc., Appellants, vs. Associated Plywood Mills, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: March 8, 1957.

Docketed: March 11, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15475

E. V. PRENTICE MACHINERY CO. and PRENTICE MACHINERY WORKS, INC.,
Appellants,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Appellee.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Appellants hereby adopt as their statement of points on which they intend to rely on appeal, the Statement of Points filed in the District Court on January 16, 1957.

/s/ MOE M. TONKON,
/s/ J. PIERRE KOLISCH,
Attorneys for Appellants.

Acknowledgment of Service attached.

[Endorsed]: Filed March 12, 1957. Paul P. O'Brien, Clerk.

No. 15475

United States
COURT OF APPEALS
for the Ninth Circuit

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Appellants,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Appellee.

APPENDIX TO APPELLANTS' BRIEF

Appeal from the United States District Court for the District of Oregon.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

E. V. PRENTICE MACHINERY CO., Plaintiff,	)	Civil
vs.	)	No. 7091
	)	ORDER
ASSOCIATED PLYWOOD MILLS, INC., Defendant.	)	

By order dated May 27, 1955, certain issues were segregated in accordance with Rule 42 (b) of the Rules of Civil Procedure. The court in an opinion dated August 16, 1955, held that the cause of action asserted in this case is separate and distinct from the cause of action litigated in a prior case between the parties, being Civil No. 6579. The court further held that the present action is not barred by the doctrines of res judicata and merger. In accordance with such opinion, the motion of defendant, Associated Plywood Mills, Inc., for summary judgment is denied.

Plaintiff's application for a ruling that the judgment of May 8, 1953, entered in Civil No. 6579, is res judicata in the present action and that the defendant Associated is collaterally estopped from denying the findings contained in the court's opinion of April 17, 1953, is denied. However, this denial is without prejudice to plaintiff's privilege of reasserting such claims at the trial.

Plaintiff may not read the court opinion or the findings of April 17, 1953, in Civil No. 6579, or any part thereof, to the jury or refer to them in the presence of the jury without prior authorization from the court.

Dated this 28th day of October, 1955.

Gus J. Solomon,
Judge.

E. V. PRENTICE CO.
Portland, Oregon

COMPARATIVE INCOME STATEMENT

	Year ended 12/31/48	Year ended 12/31/49	Year ended 12/31/50	Year ended 12/31/51	Year ended 12/31/52 Total for year 1952	1/1/52 to 6/30/52	7/1/52 to 12/31/52	Period 1/1/53 to 9/30/53	Year ended 9/30/54	Year ended 9/30/55
Sales	78,802.84	49,986.42	273,113.73	946,339.95	806,836.57	576,650.81	230,185.76	225,215.76	569,588.11	1,043,122.73
Cost of goods sold	60,539.12	34,860.96	215,654.21	769,387.89	618,325.83	412,951.36	205,374.47	144,847.15	380,697.61	688,694.04
Gross profit on sales	18,263.72	15,125.46	57,459.52	176,952.06	188,510.74	163,699.45	24,811.29	80,368.61	188,890.50	354,428.69
Commission income	4,660.06	12,048.30	16,220.09	71,561.93	31,896.10	21,097.88	10,798.22	31,879.77	20,072.92	19,972.34
Gross profit and commissions	22,923.78	27,173.76	73,679.61	248,513.99	220,406.84	184,797.33	35,609.51	112,248.38	208,963.42	374,401.03
Other income -										
Equipment rent				510.00	2,550.00	900.00	1,650.00	3,150.00	16,661.00	52,897.75
Less: Depreciation applicable					(1,176.67)	(234.66)	(942.01)	(1,323.75)	(7,332.76)	(25,998.43)
Rent received from subtenants				591.60	2,890.90	1,045.80	1,845.10	2,693.70	2,750.00	7,380.00
Less: Depreciation of buildir s										(1,382.98)
Interest			473.86	1,116.97	2,103.40	744.28	1,359.12	1,112.69	942.66	2,386.73
Service charges and sundry					1,079.64	1,079.64			875.00	2,030.19
Collection of old accounts								509.11	1,574.84	3,376.24
Award by order of court								8,034.95	3,573.52	
	22,923.78	27,173.76	74,153.47	250,732.56	227,854.11	188,332.39	39,521.72	126,425.08	228,807.66	415,167.01
Operating expenses -										
Salaries and wages	2,448.50	2,008.33	6,127.12	24,343.72	24,297.25	13,028.28	11,268.97	13,640.64	20,543.15	22,051.43
Commissions paid				1,400.00						306.39
Advertising and promotion	337.39	722.65	1,238.23	4,738.87	3,983.67	2,060.28	1,923.39	2,222.62	5,432.48	4,957.41
Travel expense	3,082.71	2,316.09	5,301.00	10,828.25	10,573.84	5,448.21	5,125.63	7,051.95	9,636.97	11,646.84
Automobile expense		2,080.09	3,737.58	4,051.41	3,965.13	1,947.94	2,017.19	2,402.31	3,626.98	3,480.55
Express and postage									2,617.70	2,458.86
Shop supplies and expense				1,595.64	822.41	455.12	367.29	312.32	588.59	2,484.89
Shop and office rent	400.00	975.00	2,642.03	3,148.00	5,850.00	2,400.00	3,450.00	4,950.00	6,700.00	7,700.00
Office supplies and expense	555.90	613.35	1,121.51	4,291.23	5,486.38	1,888.37	3,598.01	2,379.78	2,386.58	2,868.88
Telephone and telegraph	1,233.28	1,768.32	3,812.08	7,248.09	5,647.38	2,920.33	2,727.05	3,336.38	4,757.30	5,385.70
Heat, light and water			332.66		472.49	484.37	(11.88)	348.38	698.28	888.44
Engineering expense				1,795.84	471.89	316.53	155.36	134.85		
Professional services				1,278.30	7,897.47	1,575.00	6,322.47	5,188.38	6,864.63	5,888.38
Miscellaneous	1,327.16	126.53	370.46	374.57	635.20		635.20	271.01	1,780.34	683.36
Insurance - General	69.03	1,156.17	1,150.80	1,672.96	4,556.27	978.00	3,578.27	1,500.38	2,651.89	2,772.69
- Life										20,488.00
Employment taxes	10.43	50.16	34.51	1,351.62	1,113.81	676.07	437.74	706.93	979.91	688.38
Property taxes and licenses	24.00	9.10	173.10	420.00	1,737.93	403.73	1,334.20	1,738.54	1,488.49	1,387.58
Depreciation expense	83.77	2,626.10	2,738.61	5,319.85	6,093.10	3,148.65	2,944.45	2,897.36	4,648.77	4,810.38
Amortization of leasehold				1,543.80	1,543.46	771.90	771.56	1,157.40	489.88	514.19
Uncollectible accounts written off				24,749.19	4,312.17	3,000.00	1,312.17			
Provision for bad debts									2,810.94	20,438.59
Interest expense	1.41	11.00	52.85	951.21	1,395.05	871.85	523.20	361.98	1,387.41	714.58
Total selling and general expenses	9,573.58	14,462.89	28,832.54	101,102.55	90,854.90	42,374.63	48,480.27	50,278.77	79,360.98	120,488.24
Net profit for period	$13,350.20	$12,710.87	$45,320.93	$149,630.01	$136,999.21	$145,957.76	$ (8,958.55)	$ 76,146.31	$149,446.68	$294,678.77

PRENTICE MACHINE WORKS, INC.
Portland, Oregon

COMPARATIVE INCOME STATEMENT

	Year ended 2/28/53		Year ended 2/28/54		Year ended 2/28/55	
Sales		145,926.43		102,047.07		136,908.21
Cost of goods sold, per Schedule I		120,636.58		84,445.86		88,166.39
Gross profit on sales		25,289.85		17,601.21		48,741.82
General expenses -						
Salaries - Office (allocation)	8,918.46		6,537.50		4,850.00	
- Officers	10,000.00		6,150.00		18,800.00	
Employment taxes - allocation	644.58		473.85		938.50	
Office supplies and expense	1,348.96		610.61		326.47	
Telephone	338.70		317.57		302.41	
Allocation of salaries and expenses of affiliated office	902.45		--		--	
Automobile and travel expenses	1,757.03		794.27		1,118.49	
Professional services	1,035.03		1,660.45		2,095.00	
Sundry	28.37		38.19		24.50	
Interest expense	500.00		450.00		400.00	
Total general expenses		25,473.58		17,032.44		28,855.37
		(183.73)		568.77		19,886.45
Other Income -						
Commission income			21.60			
Discounts taken	270.45	270.45	211.07	232.67	243.50	243.50
Net profit before taxes		86.72		801.44		20,129.95
State and Federal income taxes		33.02		285.32		7,166.27
Net profit for year		$ 53.70		$ 516.12		$12,963.68
Salaries paid to members of partnership, E. V. Prentice Co., and listed in general expenses, above		$10,000.00		$ 6,150.00		$18,800.00

These salaries have not been included as income on the books of the partnership, E. V. Prentice Co., but they have been treated as personal income by each of the members of the partnership.

E. V. PRENTICE CO.

COMPARISON OF SALES AND GROSS PROFIT BY FIRST AND LAST HALVES OF EACH CALENDAR YEAR

	Year 1949		Year 1950		Year 1951	
	Jan.-June	July-Dec.	Jan.-June	July-Dec.	Jan.-June	July-Dec.
Gross Sales	7,762.28	43,024.14	99,837.45	213,476.28	412,468.32	533,871.63
Gross profit	2,314.19	12,811.27	12,583.63	44,875.89	75,500.00	101,452.06

	Year 1952		Year 1953		Year 1954	
	Jan.-June	July-Dec.	Jan.-June	July-Dec.	Jan-June	July-Dec.
Gross Sales	576,650.81	230,185.76	167,541.39	157,764.97	273,331.38	397,081.19
Gross Profit	163,699.45	24,811.29	54,469.90	61,242.52	107,786.39	146,007.12

Present information indicates that the second half of the year 1955 will have substantially more gross sales and gross profit than the first half of 1955.

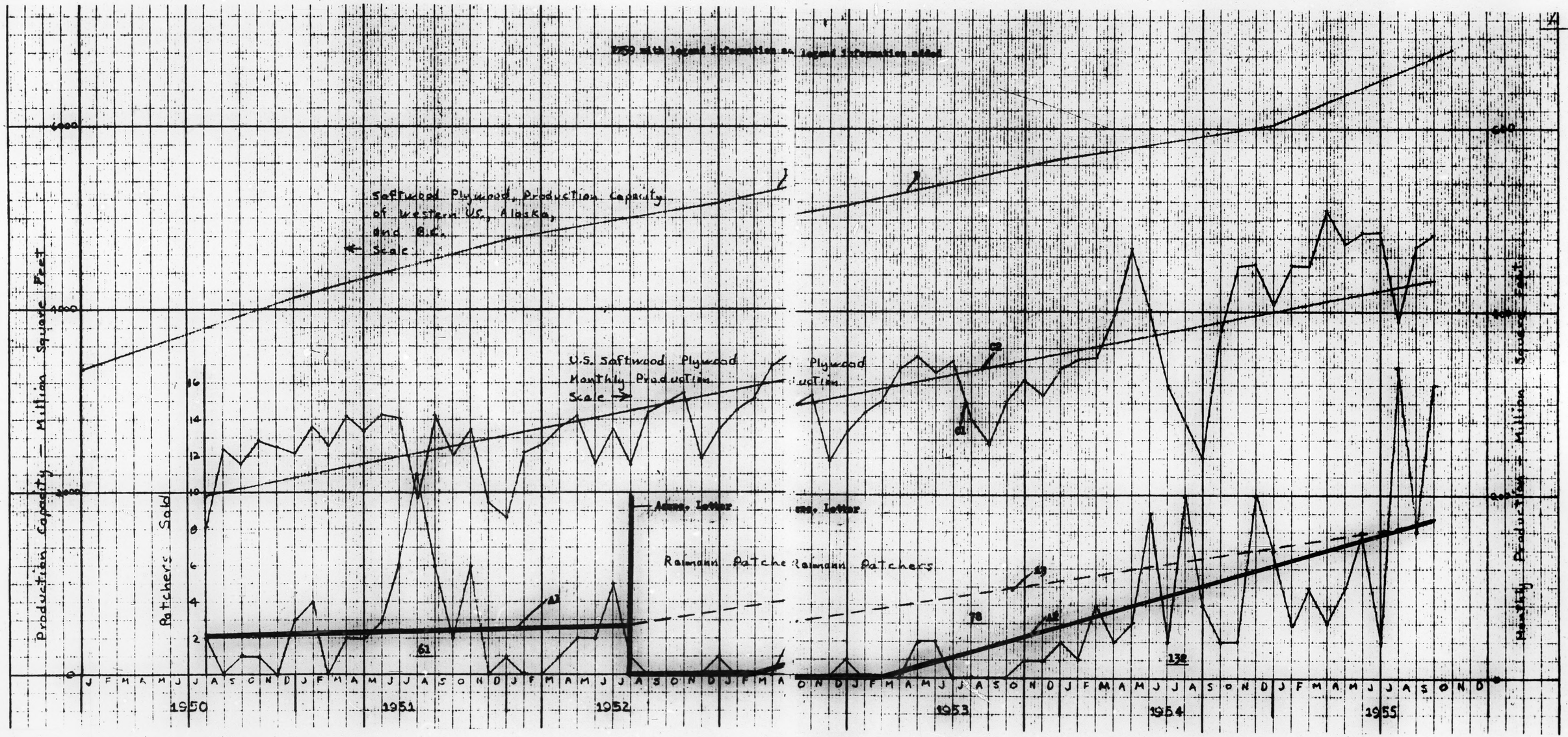
PRENTICE MACHINE WORKS, INC.

COMPARISON OF SALES AND GROSS PROFIT BY FIRST AND LAST HALVES OF EACH FISCAL YEAR

	First fiscal year		Second fiscal year		Third fiscal year		3/1/55 to
	3/1/52 to 8/31/52	9/1/52 to 2/28/53	3/1/53 to 8/31/53	9/1/53 to 2/28/54	3/1/54 to 8/31/54	9/1/54 to 2/28/55	8/31/55 Approx.
Sales	129,203.68*	16,722.75**	53,706.59	48,340.48	73,521.41	63,386.80	180,000.00
Cost of Sales	97,153.76	23,482.82	42,291.91	42,153.95	50,843.41	37,322.98	109,000.00
Gross Profit	32,049.92	(6,760.07)	11,414.68	6,186.53	22,678.00	26,063.82	71,000.00
Other income and expenses excluding salaries to Prentice brothers	7,601.42	7,601.41	5,860.56	4,709.21	2,814.50	6,997.37	6,000.00
Profit before salaries to Prentice brothers and corporation income taxes	$24,448.50	($14,361.48)	$ 5,554.12	$ 1,397.32	$19,863.50	$19,066.45	$65,000.00

* Includes some sales up to 11/30/52 but all from orders prior to period of interference.

** Almost no orders were unfilled at 2/28/53.


1959 with legend information as
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Softwood Plywood, Production Capacity of western U.S., Alaska, and B.C.
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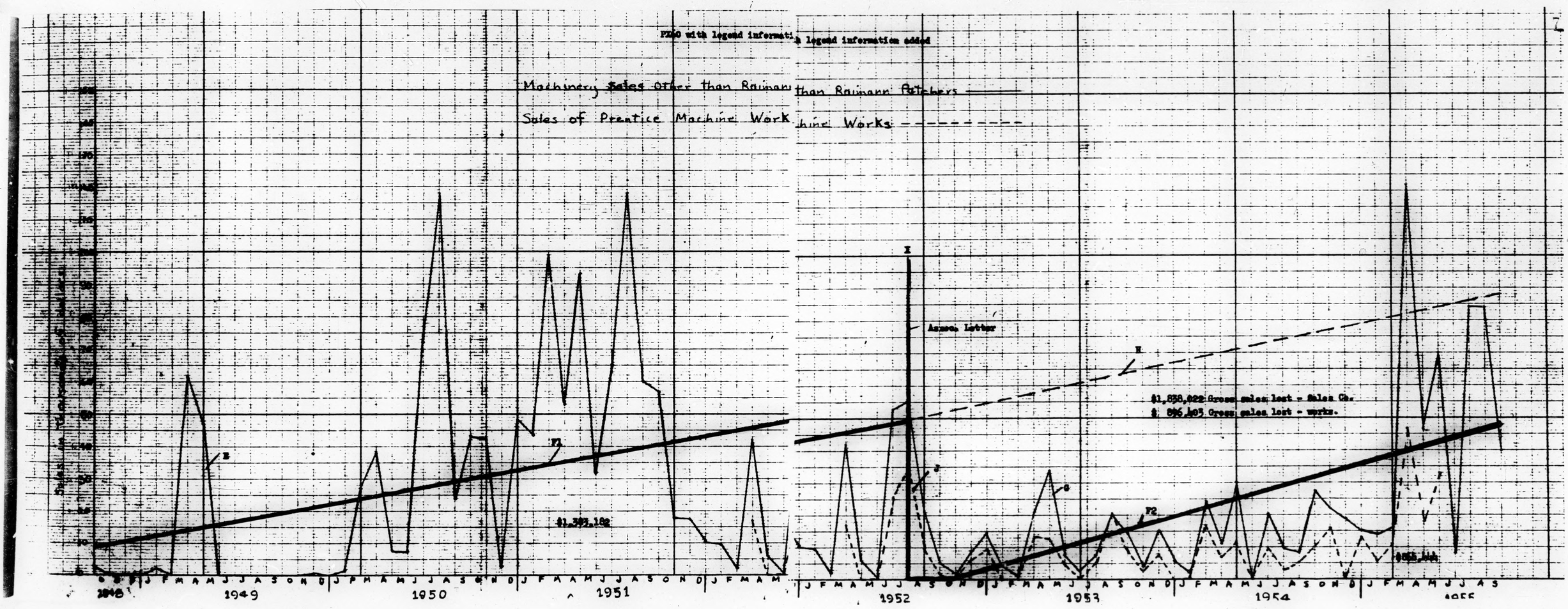
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Machinery Sales Other than Rainarn
Sales of Prentice Machine Work
E
F1
$1,393,182
1948
1949
1950
1951
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H
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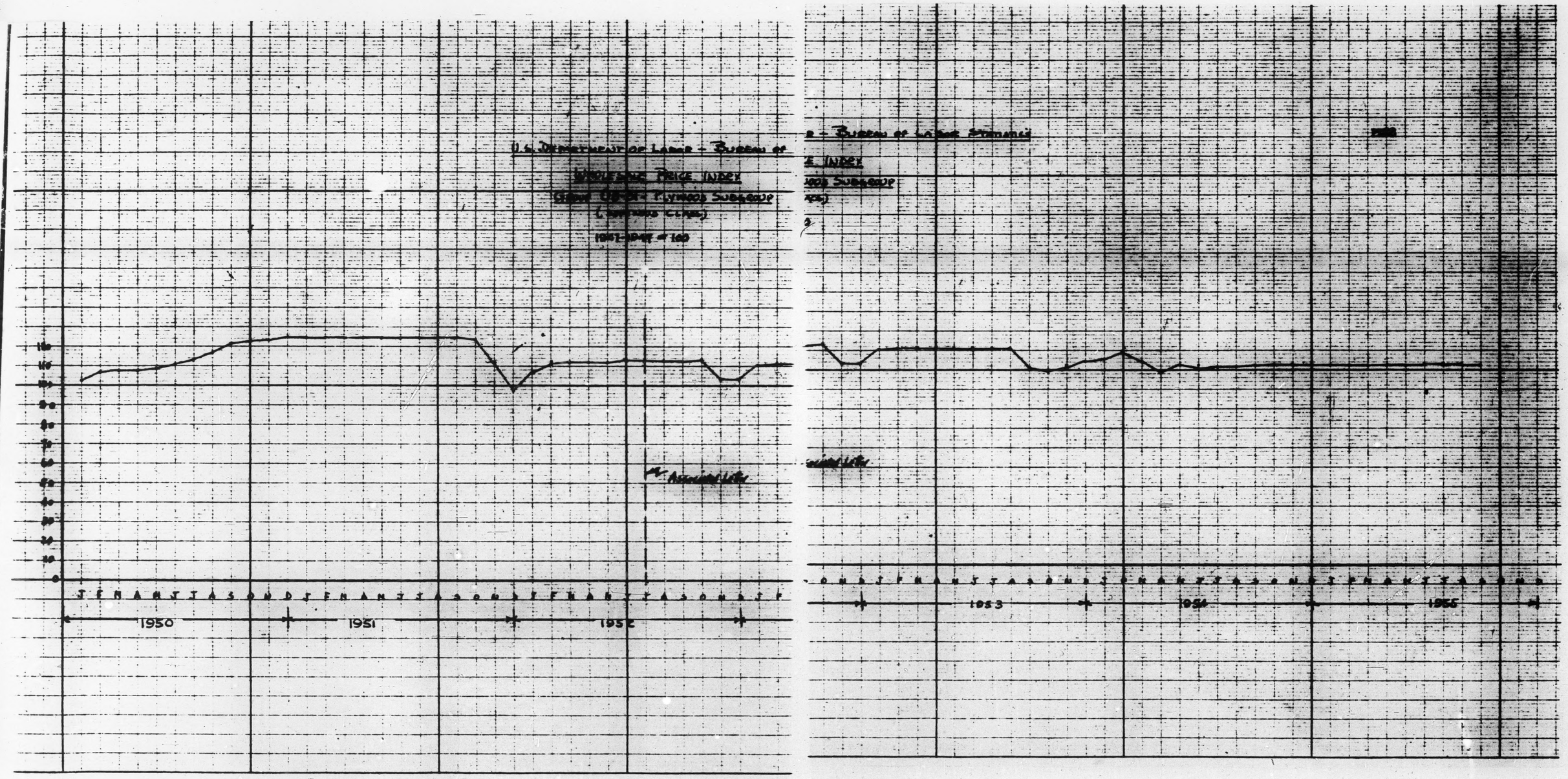
J
G
F2
1952
1953
1954


U.S. Department of Labor - Bureau of
Wholesale Price Index
1957-59 = 100
1950
1951
1952
1953
1954
1955

L. V. [redacted] Co.

Monthly Orders of Machines Other Than Delmonn Polishers For the Months Shown

Year & Month	Orders
1952	
January	$ 9,650.00
February	2,290.42
March	42,180.00
April	5,850.90
May	126.00
June	22,680.50
July	56,220.00
August	20,[illegible]9.00
September	5,270.00
October	2,180.00
November	9,112.00
December	14,816.00

E. V. PRENTICE COMPANY

and

PRENTICE MACHINE WORKS, INC.

Schedule of Orders Received for Machines

For the Periods Shown

		E. V. Prentice Co. No. of Faimann Patchers	E. V. Prentice Co. All Other Machinery
YEAR BEFORE SMITH & TUCK LETTER:			
August	1951	6	$59,063
September		2	57,481
October		6	17,887
November			17,651
December		1	10,082
January	1952		9,650
February			2,390
March		1	42,160
April		2	5,850
May		2	135
June		5	52,620
July		1	55,220
	Total for 12 months	26	$330,989
YEAR AFTER SMITH & TUCK LETTER:			
August	1952		20,329
September			5,270
October			2,150
November			9,113
December		1	14,815
January	1953		4,250
February			1,325
March			21,085
April		2	33,660
May		2	7,545
June			2,574
July			7,725
	Total for 12 months	5	$129,841

E. V. PRENTICE MACHINERY COMPANY
Portland, Oregon

Statement of Operations
for the Periods Shown Below

	Per Statement Furnished by the E.—V. Prentice Machinery Company		Computation Based on Ratable Distribution of Income and Expense	
	Year Ended December 31, 1952	Six Month Period Ended June 30, 1952	Six Month Period Ended December 31, 1952	Six Month Period Ended June 30, 1952	Six Month Period Ended December 31, 1952
SALES	$806,836.57	$576,650.81	$230,185.76	$576,650.81	$230,185.76
COST OF GOODS SOLD:	618,325.83	412,951.36	205,374.47	441,921.09	176,404.74
Gross profit %	(23.4) %	(28.4) %	(10.8) %	(23.4) %	(23.4) %
Gross profit on sales	188,510.74	163,699.45	24,811.29	134,729.72	53,781.02
Commission income	31,896.10	21,097.88	10,798.22	21,097.88	10,798.22
Gross profit and commissions	220,406.84	184,797.33	35,609.51	155,827.60	64,579.24
OTHER INCOME:					
Equipment rent	2,550.00	900.00	1,650.00	900.00	1,650.00
Less: Depreciation applicable	(1,176.67)	(234.66)	(942.01)	(234.66)	(942.01)
Rent received from sub-tenants	2,890.90	1,045.80	1,845.10	1,045.80	1,845.10
Interest	2,103.40	744.28	1,359.12	744.28	1,359.12
Service charges and sundry	1,079.64	1,079.64		1,079.64	
TOTAL GROSS OPERATING INCOME	227,854.11	188,332.39	39,521.72	159,362.66	68,491.45
OPERATING EXPENSES:					
Salaries and wages	24,297.25	13,028.28	11,268.97	13,028.28	11,268.97
Advertising and promotion	3,983.67	2,060.28	1,923.39	2,060.28	1,923.39
Travel expense	10,573.84	5,448.21	5,125.63	5,448.21	5,125.63
Automobile expense	3,965.13	1,947.94	2,017.19	1,947.94	2,017.19
Shop supplies expense	822.41	455.12	367.29	455.12	367.29
Shop and office rent	5,850.00	2,400.00	3,450.00	2,925.00	2,925.00*
Office supplies and expense	5,486.38	1,888.37	3,598.01	2,743.19	2,743.19*
Telephone and telegraph	5,647.38	2,920.33	2,727.05	2,920.33	2,727.05
Heat, light and water	472.49	484.37	(11.88)	236.24	236.25*
Engineering expense	471.89	316.53	155.36	316.53	155.36
Professional services	7,897.47	1,575.00	6,322.47	1,575.00	6,322.47
Miscellaneous	635.20		635.20		635.20
Insurance - general	4,556.27	978.00	3,578.27	2,278.13	2,278.14*
Employment taxes	1,113.81	676.07	437.74	676.07	437.74
Property taxes and licenses	1,737.93	403.73	1,334.20	868.96	868.97*
Depreciation expense	6,093.10	3,148.65	2,944.45	3,148.65	2,944.45
Amortization of leasehold	1,543.46	771.90	771.56	771.90	771.56
Uncollectible accounts written off	4,312.17	3,000.00	1,312.17	2,156.08	2,156.09*
Interest expense	1,395.05	871.85	523.20	871.85	523.20
Total operating expenses	90,854.90	42,374.63	48,480.27	44,427.76	46,427.14
NET PROFIT OR (LOSS) FOR PERIOD	$136,999.21	$145,957.76	$(8,958.55)	$114,934.90	$ 22,064.31

* Amounts adjusted ratably for six month distribution.

DK307

E. V. PRENTICE MACHINERY CO.

vs.

ASSOCIATED PLYWOOD MILLS, INC.

Portland, Oregon

Schedule of Sales by E. V. Prentice Machinery Co. by Years and Three-Month Quarters for the Period January 1, 1948 to June 30, 1955

	Total	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
1948	$ 78,803	$ 31,501	$ 20,753	$ 19,395	$ 7,154
1949	50,786	5,513	2,314	33,858	9,101
1950	273,314	37,222	22,616	84,589	128,887
1951	946,340	127,784	284,504	238,127	295,925
1952	806,837	414,301	162,350	99,868	130,318
1953	325,306	71,432	96,109	57,674	100,091
1954	670,384	95,794	180,538	193,166	200,886
1955	724,138	268,444	249,944	205,750*	
Total Sales by Quarters	$3,875,908	$1,051,991	$1,019,128	$ 932,427	$ 872,362

NOTE - *One month only - July, 1955.

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In the

Supreme Court of the United States

October Term, 1957

No. 904

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Petitioners,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Respondent.

Petition for a Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

J. PIERRE KOLISCH,
501 Pacific Building,
Portland 4, Oregon,

MOE M. TONKON,
1007 Public Service Building,
Portland 4, Oregon,
Attorneys for Petitioners.

DAILY JOURNAL OF COMMERCE

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In the Supreme Court of the United States

October Term, 1957

No. ————

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Petitioners,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Respondent.

Petition for a Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

Petitioners, E. V. Prentice Machinery Co. and Prentice Machinery Works, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the District Court (R. 96, App. 1a)* is reported at 113 F. Supp. 182. The opinion of the Court of Appeals (R. 471, App. 11a) has not yet been reported.

* "R." designates page of printed transcript of record. "App." designates page of Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1958 (R. 480, App. 25a). The jurisdiction of the District Court was based on 15 U.S.C. § 15 and jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In a private treble damage action under the Clayton Act in which defendant admitted deliberate violation of the Act by an illegal attack on plaintiffs' business, should not a decision of *no* damages be reversed where it is uncontradicted that plaintiffs suffered a sharp decline in business immediately after the violation?

2. Can an admitted violator of the antitrust laws escape payment of any damages whatever because at the time of the illegal attack the business of the victims might have been suffering a temporary decline from other causes?

3. Where plaintiffs in a private treble damage action have proven the amount of damages suffered by them in strict accordance with the decisions of the Supreme Court, have they not at the same time proven the fact of damages?

4. Does not the doctrine of collateral estoppel make conclusive a finding of damage where in the prior proceedings between the parties the same court expressly found that defendant was guilty of bad faith, inequitable conduct and that defendant's conduct had damaged plaintiffs' business?

STATUTES INVOLVED

Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1, 2 (App. 26a, 27a), and Clayton Act, 38 Stat. 730, 15 U.S.C. §§ 14, 15 (App. 27a, 28a).

STATEMENT

This is a private treble damage action under Section 4 of the Clayton Act (15 U.S.C. § 15). Respondent (Associated) admitted liability for deliberate violations of the antitrust laws. The District Court found that there had been a decline in petitioners' business but that it was caused entirely by other factors and held, therefore, that petitioners had suffered no damages.

The materiality and correctness of the following facts are undisputed.

Associated and petitioners, E. V. Prentice Machinery Co. (Prentice), were competitors in offering to the plywood industry automatic veneer patching machines. Associated, without prior notice to Prentice, sent a let-

ter to 29 of Prentice's 31 customers threatening patent litigation unless they ceased using certain Raimann machines purchased from Prentice and account to Associated for profits and damages. The letters were sent in bad faith and with the purpose of destroying Prentice's business (R. 64-67, 76, 77, App. 12a, 13a).

For four months thereafter, until Prentice successfully concluded a declaratory judgment action establishing the invalidity of Associated's patents, Prentice neither sold nor obtained an order for a single Raimann machine. The rest of the petitioners' business also declined (App. 17a, 18a).

Immediately prior to the present trial, Associated admitted liability, and the issue of damages was tried to the court. The trial judge (Hon. Gus J. Solomon, the same judge who had presided at the prior patent action) found that petitioners had suffered no damages, and "the reduction in sales and profits which occurred in 1952 and 1953 was caused by" other factors for which respondent was not responsible (App. 9a).

The Court of Appeals, although stating that the trial court could have found that "appellants' business recession was caused by the wrongful acts . . .," nevertheless affirmed. The Court held that there was substantial evidence tending to show that the drop in busi-

ness was due to other causes, and that the trier of facts was entitled to find, as he did, that (App. 22a):

> ". . . the wrongful conduct for which Associated is chargeable *contributed not at all* to appellants' poor business showing in 1952 or later years."*

REASONS FOR GRANTING THE WRIT

1. A Correct Decision in this Case is Important in the Administration of the Antitrust Laws

This Court has often recognized the public interest in vigilant enforcement of the antitrust laws by means of private treble damage actions and that the private treble damage action is probably the most effective method of deterring violators and implementing a salutary public policy. *Lawlor v. National Screen Service Corp.*, 1955, 349 U.S. 322, 329; and *Nashville Milk Co. v. Carnation Company*, 1958, 355 U.S. —, 2 L. Ed. 340, 349 (separate opinion). See also 61 Yale L. J. 1010, 1058-1062; 63 Harv. L. R. 907, 909.

This is the first private treble damage action ever brought to trial in the Oregon District Court. If the court's decision is not rectified it will stand as an effective barrier against any other private treble damage actions in that court because of the impossible burden

* All emphasis added unless otherwise noted.

of proof the District Court placed on plaintiffs in such actions. The situation is aggravated in the Ninth Circuit by the Court of Appeals' reliance on the "clearly erróneous" rule to affirm the District Court's decision which is contrary to the spirit, if not the letter, of the controlling decisions by this Court.

The action of the Court of Appeals is another indication of the unfavorable view taken in the Ninth Circuit toward antitrust treble damage actions. The other most recent decisions of that Court are *Flintkote v. Lysfjord*, 1957, 246 F.2d 368, cert. denied — U.S. —, and *Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188, decided Nov. 7, 1957.

II. There Is a Conflict With the Decisions of This Court.

The evidence submitted by petitioners to prove damages was at least as good, if not better than, that approved by this Court in the leading cases of *Story Parchment Co. v. Paterson Parchment Paper Co. et al.*, 1931, 282 U.S. 555, and *Bigelow v. RKO Radio Pictures Inc.*, 1946, 327 U.S. 251.* Petitioners, just as plaintiffs in those cases, compared their earnings before and after the admittedly illegal acts and, additionally, petitioners submitted uncontradicted statistical analyses of their business which proved substantial damages (petitioners' ex-

* The Court of Appeals' disposition (footnote 4, App. 21 a) of the cases relied on by petitioners is in avoidance of the meaning and thrust of these decisions. The Court merely extracted for comment a distinction without a difference between the case at bar and those cases.

hibits appearing in appendix to their opening brief in Court of Appeals, filed herewith).

Associated relied on the defense that petitioners' decline in business commenced before Associated's attack and was caused by factors for which Associated could not be held responsible, such as defective equipment, poor management and economic conditions in the plywood industry.* *This defense at best could only serve to mitigate damages* but could not disprove the fact of at least some damages to petitioners which was established by the illegal attack coupled with an admitted decline in petitioners' business (App. 17a, Finding XVII, R. 110).

It is simply incredible that Associated's coercion of Prentice's customers had no effect whatever on Prentice's business. Certainty of causation of injury by an illegal act has been accepted for much less convincing reasons. 64 Harv. L. R. 317, 320, 323, 324.

III. An Authoritative Ruling Should be Made by This Court on the Burden of Proof, and the Fact and Amount of Damages in Antitrust Cases

As will be apparent from the exhibits appearing in the appendix to petitioners' brief in the Court of Ap-

* None of these factors ever hurt petitioners' business before Associated's attack. It is common knowledge that after the trial below economic conditions in the plywood industry grew progressively worse. Given the opportunity of a new trial, petitioners will show that during the same period their business grew progressively better.

peals, filed herewith, and the facts appearing in the foregoing Statement, petitioners proved the fact and amount of their damages about as conclusively as it is possible to prove them in an antitrust treble damage action.

We submit that this Court has recognized that plaintiff in a treble damage action has made out a prima facie case once he has shown a violation of the antitrust laws and a loss of revenue to him. The affirmative burden is then imposed on defendant to show, if he can, *what portion of plaintiffs' loss was not caused by the violation. Bigelow v. RKO Radio Pictures, Inc.*, supra, at p. 264. Associated did not satisfy this burden by its shotgun-type defense.

In view of the public importance of questions relating to the administration and enforcement of the antitrust laws, it is urgent that there be an explicit holding by this Court on that which has been understood by legal scholars and practicing attorneys to be at least implicit in the Court's decisions.*

This Court should also make an express ruling with respect to proof of the fact of damages and the amount

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* See particularly, "Proof Requirements in Antitrust Suits: the Obstacles to Treble Damage Recovery," 18 Un. of Chic. Law Rev. 130, 133, and "The Proof of Damages Under the Anti-Trust Laws," 41 Ill. Law Rev. 462, 464. See also "Damages Under the Anti-Trust Laws," 88 Un. of Pa. Law Rev. 511, 513, 518, 519, and "The Treble Damage Action," 1950 Un. of Ill. Law Forum 659, 671.

of damages in antitrust cases. The Court of Appeals (App. 20a) erroneously separated proof of the fact of damages from that of the amount of damages. If a plaintiff proves the amount of damages, as did petitioners, he has also proved the fact of damages. See the clear statement on this point in 52 Mich. Law Rev. 363, 374, and also 64 Harv. L. R. 317, 318.

IV. The Refusal of the Court of Appeals to Apply the Doctrine of Collateral Estoppel is Contrary to the Decisions of this Court and Policy of Enforcement of the Antitrust Laws.

In the prior litigation between the parties, the District Court's opinion (R. 63, 113 F.Supp. 182) contained findings of fact that Prentice's business had been damaged by Associated's attack (see footnote 3, opinion of the Court of Appeals, App. 15a).

The Court of Appeals rejected petitioners' collateral estoppel argument on the grounds that the findings of the District Court in the prior case as to damages were not essential to the prior decision of that Court, (App. 17a).

There is no justification in law or logic for the Court of Appeals' *ex post facto* appraisal of the prior findings and the Court's selection of which facts were

"adequate" and which were "additional" and "not essential" to the District Court's decision.

It could just as well be said that the District Court's prior findings of damages to Prentice were adequate to support that Court's decision and that the other findings were additional and not essential. A full reading of the District Court's findings (R. 74-78) shows that clearly the District Court considered them to be material and essential to its decision. Associated should not now be permitted to benefit from a restricted interpretation of the facts on which it permitted a final unappealed order to be entered.

Even if we adopt the findings selected by the Court of Appeals, they necessarily add up to the conclusion that Prentice must have been damaged at least to some extent by Associated's attack. The Court of Appeals stated, App. 16a:

> "The purport of these findings is that Associated, with full knowledge of the doubtful validity of the Skoog patents, *and for the purpose of destroying the Prentice competition* while avoiding a court test, engaged in the criticized activity."

The sending of threatening letters to Prentice's customers to destroy competition could not have avoided causing damage to Prentice.

If Associated is permitted to escape the effect of previous findings of the District Court of damages to Prentice, the result will be neither consistent with this Court's policy of enforcement of the antitrust laws or the doctrine of collateral estoppel. *Lawlor v. National Screen Service Corp.*, supra, at p. 329.

CONCLUSION

The decision of the Court of Appeals supports the proposition that it is safe to attack a competitor whose business is already suffering because it is impossible for the victim to prove the amount of damages caused by the wrongdoer.

It is time that this Court called a halt to the continuing trend of hostility in the Ninth Circuit toward antitrust litigation. The petition for writ of certiorari should be granted.

Respectfully submitted,

J. PIERRE KOLISCH
MOE M. TONKON

Attorneys for Petitioners.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil No. 7091

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Plaintiffs,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Defendants.

OPINION

September 29, 1956

Solomon, Judge:

I find that the plaintiffs did not suffer any damage by reason of the wrongful acts of the defendant, and defendant is therefore entitled to a judgment in its favor.

Comment

This is not a case in which plaintiffs were unable to prove the exact amount of damages which they suffered. It is a case in which plaintiffs failed to prove that they suffered any damage.

I appreciate the fact that it is unusual to disallow

damages in a case in which plaintiffs claimed large damages and the defendant admitted liability. I had therefore hoped to be able to prepare an opinion for publication which would supplement the very interesting history of this action and the facts out of which it arose, which appear in my opinion in the prior case between the same parties. E. V. Prentice v. Associated Plywood Mills, 113 F. Supp. 182 (1953). I had also hoped to set forth in a more polished manner the reasons for my decision. However, because of the press of other urgent work and because of the long delay that has already taken place, I must now announce my decision together with some of the reasons therefor. In the findings of fact that will be entered these reasons may be set forth with greater specificity.

At the commencement of this trial, I was of the opinion that the plaintiffs had suffered serious damage, and in the prior case, at page 184, I stated that the receipt of the Smith and Tuck letter of July 25, 1952, by Prentice's customers caused great consternation and "effectively stopped sales of Raimann machines, as well as other equipment sold or distributed by Prentice." This statement was based upon a representation made to me at the time that plaintiff's attorneys were resisting an application for a delay of the trial. I am now convinced that this statement was

incorrect and that the representations made to me at that time were erroneous.

In order to prove damages, plaintiffs relied primarily upon the books and records of the company which showed the number of sales and the amount of business done from the inception of the business to the date of the trial and upon statistical studies made from these books and records. In this manner they attempted to show the amount of sales and the profits the plaintiffs would have made if the Smith and Tuck letter of July 25, 1952, had not been sent and if the litigation had not occurred.

Plaintiffs were unable to produce even one witness who could testify that he refused to purchase a Raimann machine or other equipment sold by plaintiffs by reason of the Smith and Tuck letter or by reason of the resulting litigation. Likewise, plaintiffs produced no evidence that the Skoog machine or any other automatic patcher replaced a single Raimann machine or that a Skoog or other patcher was sold or leased to a customer who was considering or who might have purchased a Raimann machine.

Plaintiffs' friend John Powers testified that in his opinion plaintiffs did lose business, but there was no factual basis for his opinion and he frankly admitted

that the Smith and Tuck letter made no difference to him and that he purchased everything he intended to purchase from plaintiffs. One witness, Raymond J. Martin, testified that Martin Brothers Box Company, upon receipt of the letter, "held up tentatively any further purchases" but that after the litigation was concluded his company purchased three Raimann machines from the plaintiffs, which was all the machines it had ever contemplated purchasing. He also stated that the Smith and Tuck letter did not affect the purchases of other types of equipment and that his company bought no equipment from any other supplier by reason of the Smith and Tuck letter.

A statistical study employing the method of "least squares" was used as a substitute for specific evidence concerning lost sales. However, in order to make a projection which has any validity, this statistical method requires that one assume that the same conditions would be operative in the future as were operative in the past and that the deviations about the line will be random; in other words, that the deviation around the trend for a particular month is independent from the deviation for every other month. Or stated diiferently, the "least squares" method can be legitimately used only in cases in which there is a mass market with random fluctuations without seasonal or

cyclical variations unless the seasonal variations are unform and can be removed.

The evidence in this case showed that this was not a mass market. The principal items sold from $9,000 or $10,000 each to more than $30,000 each. The sale of one piece of equipment often made the difference between a poor month and a good month, and the equipping of one mill could mean the difference between a poor year and a good one.

In the type of business in which plaintiffs are engaged, personal factors are of great importance. Plaintiffs testified as to the excellent reputation which their father enjoyed and of their wide acquaintance in the industry. Dave Prentice's membership on the Board of Directors of the Medford Veneer and Plywood Company was responsible for a substantial amount of business.

On the other hand, dissatisfaction by customers and suppliers are also important. The evidence showed that many of plaintiffs' customers were dissatisfied for a wide variety of reasons. Some of them did not like the equipment that had been sold to them (Exhibit 102, Roseburg Lumber Co. letter of February 5, 1952; Exhibit 166, Albany Veneer, Inc. letter of February 22, 1952; Exhibit 183, Pacific Veneers, Inc. letter of

September 17, 1952). Some of them thought that the plaintiffs' service was very bad. One customer, Mt. Baker Plywood, Inc., which during the year 1952 had purchased in excess of $72,000 in equipment, ended its letter. "* * * the service which we have received from your company is the worst of any company from whom we have bought equipment. This applies to all of the equipment which we have purchased through your company, which I shall not take the trouble to enumerate at this time." (Exhibit 105.)

The die situation on the Raimann machines was also causing plaintiffs a great deal of difficulty with their customers (Exhibits 109, 113, 154, 162 and 182). Other exhibits indicate that the partners were wasting time, loafing in the office, and not devoting enough time and effort to sales (Exhibit 124). They were deliberately not pushing sales (Exhibits 180 and 200).

In addition to these personal factors, there were many other factors over which plaintiffs had no control. For example, plaintiffs' own exhibit (Exhibit 59) showed that the plywood industry has had considerable cyclical fluctuations throughout the period covered by the graph (1950-1955). The evidence also showed that there were price breaks, some of which corresponded with production breaks. This was par-

ticularly true in November and December, 1951, and November, 1952.

Plaintiffs in letters to the Raimann Company and another manufacturer of equipment as well as to a member of the Prentice family, written in 1952, called attention to the correlation between price and the production of plywood and the demand for equipment. In fact, this was the basis upon which plaintiffs requested the Raimann Company to delay shipping patchers and for the later cancellation of orders (Exhibits 149 and 150). See also Exhibits 101 and 153.). However, at the trial, the writers of such letters stated that some of the letters were incorrect and others deliberately false. For example, Thomas Prentice in a letter to Wheeler Osgood Company, dated January 7, 1952 (Exhibit No. 101), stated:

> "The second consideration is the fact that the plywood market hit a slump and these slumps such as we saw in 1949 and 1950 create a conservative attitude among the plywood people with regard to the purchase of new equipment for a period of six months to a year, following the return to normal business."

At the trial Mr. Prentice testified that he was negotiating for the purchase of patent rights on a clipper machine from the Wheeler Osgood Company. In order to hold down the price, he made this false statement

at the suggestion of an employee of the Wheeler Osgood Company and this was "part of (the) manipulation."

The testimony concerning the reasons for writing other letters containing false statements were not as plausible as those given for the Wheeler Osgood letter.

Plaintiffs' Exhibits 57 and 58, which contain a comparison of sales and gross profits by first and last halves of each calendar year from January 1, 1949, to December 31, 1954, are no evidence that the Smith and Tuck letters resulted in a loss of business not only during the last half of 1952, but also during the whole of 1953.

Plaintiffs' Exhibit 75, which contains a record of sales and commissions of plaintiff E. V. Prentice Machinery Co. for the year 1952 by months, is much more revealing. It shows that more than 40 per cent of the total sales and the total commissions for the year were made during the first two months. Since a great portion of these sales were the result of orders written during the year 1951 and prior to the sharp reduction in both price and production of plywood, it confirms the correlation between price and production of plywood on the one hand and the sale of equipment on the other.

In my opinion some of the fluctuations in plaintiffs' business were greater than the fluctuations in the price and production of plywood. This is true because a supplier of machinery for the plywood industry will have greater fluctuations than those of the plywood industry itself because its market is dependent upon a derived demand.

There are many other facts which were developed by the evidence which confirm my finding that neither the Smith and Tuck letter nor the offensive provisions in the leases on the Skoog machine resulted in any loss or damage to the plaintiffs. However, the facts which I have heretofore discussed clearly indicate the insufficiency of evidence adduced by the plaintiffs to show loss or damage and unsatisfactory character of the evidence that was introduced.

Defendant's evidence showed that the reduction in sales and profits which occurred in 1952 and 1953 was caused by factors other than the letter and the offensive lease provisions.

Plaintiffs announced that unless they were granted substantial damages they did not want any. In other words, they are not interested in either a nominal or a small award.

Attorneys for defendant may prepare findings of fact, conclusions of law and a judgment in favor of the defendant in accordance with this opinion.

[Endorsed]: Filed Sept. 29, 1956.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,475

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Appellants,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Appellee.

Jan. 28, 1958

Appeal from the United States District Court for the District of Oregon

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Before: Fee and Hamley, Circuit Judges, and Ross, District Judge

HAMLEY, Circuit Judge:

Plaintiffs appeal from a judgment for defendant in this treble damage action brought under § 4 of the Clayton Act, 15 U.S.C.A. § 15. Prior to the nonjury trial, defendant admitted liability, but denied that plaintiffs had sustained any damage. The trial court adopted this view. On appeal, plaintiffs contend that the controlling law of damages in antitrust suits was disregarded, and that the findings of fact, in substantial respects, are clearly erroneous.

Appellant E. V. Prentice Machinery Co. (Prentice) is an Oregon partnership, organized in 1947, engaged in the business of selling plywood maufacturing equipment. Appellant Prentice Machinery Works, Inc., is an Oregon corporation, organized in March 1952 by the partners of Prentice. The corporation is engaged in the business of manufacturing plywood manufacturing equipment.

In 1950, Prentice became an authorized agent to import and sell automatic veneer patching machines manufactured in Germany by B. Raimann GMBH of Freiberg, Germany. Prentice thereafter sold a substantial number of these machines in interstate commerce.

Appellee, Associated Plywood Mills, Inc., (Associated) has, since 1941, engaged in the business of manufacturing and leasing veneer patchers known as Skoog machines. The Raimann and Skoog machines are competitive pieces of equipment.

On July 25, 1952, attorneys for Associated sent letters to twenty-nine customers of Prentice. In these letters, it was asserted that the Raimann machines infringed the patents on the Skoog machines. A demand was made that the recipient of the letter cease and desist its infringement, and that it make an account-

ing and pay damages to Associated for the claimed unlicensed use of the infringing machinery.

On August 8, 1952, Prentice commenced a declaratory judgment action against Associated, in the United States District Court for the District of Oregon. The purpose of the action was to have the Skoog patents declared invalid and not infringed. Associated filed an answer and cross-complaint, in which damages were demanded for patent infringement and unfair competition. One week after this action was begun, attorneys for Associated sent additional letters to certain customers of Prentice who had not replied to their letter of July 25, 1952, inquiring whether the alleged infringing activities had ceased.

A jury trial of the declaratory judgment action resulted in a verdict for Prentice. Prentice then applied for an allowance for attorney's fees, pursuant to 35 U.S.C.A., § 70. The court, after hearing, found that Associated had been guilty of such unfairness and inequitable conduct that it would be grossly unjust for Prentice to bear the burden of its own attorney's fees. E. V. Prentice Co. v. Associated Plywood Mills, 113 F. Supp. 182, 188.[1] On May 8, 1953, judgment was

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[1]35 U.S.C.A., § 70, was superseded on July 19, 1952, by 35 U.S.C.A., § 285. The parties were in agreement, however, that the new provision neither enlarges nor diminishes plaintiffs' rights. See 113 F. Supp. 182, 183.

entered in that action declaring the Skoog patents invalid, and awarding Prentice an attorney's fee in the amount of $7,500.

Prentice then began the instant action in the same court on July 30, 1953. Seeking treble damages, Prentice alleged that Associated had engaged in specified activities violative of the antitrust laws. Principal among these, according to the complaint, was the action of Associated's attorneys in sending out the letters which have been referred to above. In the original complaint, Prentice sought recovery of triple the sum of $300,000. By pretrial amendments, the basic amount claimed was raised first to $600,000, and finally to $1,500,000.[2]

At the commencement of the trial, and for the purposes of this proceeding only, Associated admitted liability in violating the antitrust laws, and waived all defenses relating to the issue of its liability to plaintiffs. In doing so, it expressly reserved for determination in this action the question of whether appellant sustained any damage by any act of Associated as-

[2] Prentice Machinery Works, Inc., was added as a party plaintiff shortly before the trial. An attorney for United States Plywood Corporation stated to the court, at the outset of the trial, that his client had purchased all of the assets and assumed all of the liabilities of Associated, and would be responsible for any judgment entered against Associated.

serted in this action. The trial therefore proceeded on the single issue of damages.

In rendering judgment for Associated, after the trial on this issue, the court found that neither plaintiff sustained any damage by reason of any act of Associated asserted or assertable in this action.

Appellants contend that, regardless of the evidence in this case, the trial court should not have made such a finding, because Associated was bound by contrary findings made in the prior proceeding. The particular findings entered in the previous case (113 F. Supp. 182) on which appellants rely are set out below.[3]

The principal [sic] here sought to be invoked is that of collateral estopped by judgment. This doctrine makes conclusive in subsequent proceedings determinations of fact, and mixed fact and law, that were essential to the earlier decision. It is predicated on the idea that once a party has fought out a matter in litigation with the opposing party, he cannot later renew the duel.

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[3] ". . . The receipt of such letters caused great consternation among Prentice's customers and effectively stopped sales of Raimann machines, as well as other equipment sold or distributed by Prentice." (p. 184)

"Associated, when it sent letters to 29 of Prentice's customers threatening patent infringement actions and demanding damages, knew that such letters would effectively stop future sales of the Raimann machine and would probably require Prentice to inform its customers that it could neither defend them against such actions nor assume liability for damages in the event such cases were decided in favor of Associated." (p. 187)

"Associated knew that Prentice would necessarily incur heavy financial losses by the mailing of such letters to Prentice's customers." (p. 188)

Commissioner of Internal Revenue v. Sunnen, 333 U. S. 591, 598.

In the prior proceedings, the question for determination was whether attorney's fees should be awarded to Prentice, the prevailing party in that case. In making that determination, the court properly indicated that it would be guided by the criteria stated in Park-in-Theatres v. Perkins (9 Cir.), 190 F. 2d 137, 142. In the latter decision, it was held that an attorney's fee may be allowed in cases of this kind, where there is a finding of unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force, which makes it grossly unjust that the winner of the lawsuit be left to bear the burden of his own counsel fees.

In holding that Associated had been guilty of such conduct, and that it would therefore be unjust for Prentice to bear its own counsel fees, the court in the prior proceedings made detailed findings of fact. The purport of these findings is that Associated, with full knowledge of the doubtful validity of the Skoog patents, and for the purpose of destroying the Prentice competition while avoiding a court test, engaged in the criticized activity. These findings were adequate, under the Park-in-Theatres criteria, to support the order allowing attorney's fees.

The additional findings, to the effect that the objectionable conduct had actually resulted in damage to Prentice, were therefore not essential to that decision. This being the case, the doctrine of collateral estoppel by judgment does not bind Associated with respect to the prior findings on the question of damages.

As before indicated, the trial court here held that appellants failed to prove that they had sustained any damage.

Regarding the quantum of proof required to establish the fact of damage, the rule is that the plaintiff is required to establish with reasonable probability the existence of some casual [sic] connection between the defendant's wrongful act and some loss of anticipated revenue. Flintkote Company v. Lysfjord (9 Cir.), 246 F. 2d 368, 392, cert. den. ——U. S.——.

In an effort to provide such proof, appellants sought to show that they had suffered a substantial decline in business immediately after the wrongful acts were committed by Associated, and that this decline was caused by such acts. It was established by oral testimony and business records that Prentice experienced very poor business for a period of months after the letters were sent to its customers on July 25, 1952. No Raimann machines were sold between then and

November 1952. The other business of the two appellants was also at a very low ebb at that time. After November 1952, the business of the two appellants slowly picked up. This followed, in point of time, the termination of the patent litigation and notification to Prentice customers that Associated's patent claims had been rejected by the court.

Appellants asked the trial court to infer, from this coincidence in point of time, that the decrease in business resulted from the wrongful acts. Additional evidence was also submitted tending to establish such a causal connection. There was oral testimony that Prentice was "deluged" with telephone calls and letters from customers who had received the Associated letter. All were concerned with the threat of infringement suits, and inquired what protection Prentice would give them.

There was also testimony that, as a result of such letters, customers and prospective customers indicated a loss of confidence in appellants. The business of manufacturing, selling, and servicing plywood machinery on a prosperous basis was pictured as one which was especially dependent upon maintenance of an unchallenged reputation for stability and responsibility.

Associated offered little, if any, evidence to dispute appellants' showing that they had experienced very

poor business from July to November 1952, after which trade gradually picked up. Associated did, however, submit evidence in contradiction of appellants' contention and evidence that the latter's lack of business during this period resulted from the circulation of the threatening letters.

This evidence consisted of oral testimony, including crossexamination of appellants' witnesses, and certain letters taken from appellants' files. It tended to show that appellants' low level of business from July to November 1952 was the continuation of a trend which began in the spring of that year. This downward trend, according to the evidence produced by Associated, resulted partly from a deterioration of general economic conditions in the plywood industry. It was also, if Associated's testimony is to be believed, due partly to customer dissatisfaction with the Raimann machines, and to poor selling public relations practices on the part of appellants.

The trial court apparently accepted as true appellants' showing that they experienced a low level of business in the summer and fall of 1952. But the court found, contrary to appellants' thesis, that the poor business then experienced did not result from the circulation of the threatening letters. Finding Associated's evidence concerning causation more convincing

than that of appellants, the court held that other factors were responsible.

Specifically, the court found that there was customer dissatisfaction regarding the Raimann machines and other machines purchased from appellants, and with the latter's service and sales policies. It was also found that appellants failed to conduct and operate their business in an aggressive and businesslike manner.

This, and a sharp decrease in plywood prices prior to and during the period in question, the court found, caused the decline in appellants' business. The downward trend in that business began, according to the findings of fact, several months prior to the circulation of the threatening letters. The ultimate finding, as before noted, was that neither appellant sustained any damage by reason of any act of Associated asserted or assertable in this action.

Much of appellants' argument in this court is directed to the proposition that the evidence which they submitted concerning the amount of damages sustained was sufficiently certain to support a substantial award. The trial court, however, found against appellants on the question of the fact of damage, and so did not reach the question of the extent of damage. It follows that the rules of law applicable to the determination of

the amount of damages in cases of this kind do not concern us on this review.

Appellants' documentary evidence showing the low level of their business in the latter part of 1952 was, as before indicated, apparently accepted by the trial court as establishing that fact. On the basis of such evidence, and in the absence of conflicting evidence, the trial court could have inferred therefrom, and found, that appellants' business recession was caused by the wrongful acts of Associated. Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251, 264.

But the trier of fact was not compelled to draw such an inference, where, as here, there was substantial evidence tending to show that the drop in appellants' business was due to other causes.[4]

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[4]In all but one of the cases cited by appellants, the question was not (as it is here) whether a finding **against** plaintiff on the question of causation (or amount of damages) is supportable, but whether a finding or verdict **for** plaintiff on this question may be sustained. See Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251, 264; Story Parchment Co. v. Paterson Co., 282 U. S. 555; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359; American Crystal Sugar Co. v. Mandeville Island Farms (9 Cir.), 195 F. 2d 622, cert. den. 334 U. S. 957; Universal Pictures Co. v. Harold Lloyd Corp. (9 Cir.), 162 F. 2d 354; International Industries & Developments, Inc. v. Farbach Chemical Co. (6 Cir.), 241 F. 2d 246; Kobe, Inc. v. Dempsey Pump Co. (10 Cir.), 198 F. 2d 416, cert. den., 344 U. S. 837; Connecticut Importing Co. v. Continental Dist. Corp. (2 Cir.), 129 F. 2d 651, cert. den. 317 U. S. 664; American Can Co. v. Ladoga Canning Co. (7 Cir.) 44 F. 2d 763, cert. den., 282 U. S. 899; William H. Rankin Co. v. Associated Bill Posters of U. S. (2 Cir.), 42 F. 2d 152, cert. den., 282 U. S. 864. Needless to say, a holding that the evidence is sufficient to support a finding or verdict that the established decrease in business was caused by a defendant's wrongful acts is not authority for the proposition that a contrary finding or verdict on that fact question must be set aside.

In American Cooperative Serum Ass'n v. Anchor Serum Co. (7 Cir.), 153 F. 2d 907, cert. den. 329 U. S. 721, cited by appellants, the trial court's action in setting aside the jury's special verdict to the effect that the plaintiff had not

It is true that a plaintiff may recover for loss to which a defendant's wrongful conduct substantially contributed, notwithstanding that other factors also contributed. Restatement, Torts, § 431. However, as pointed out in Momand v. Universal Film Exchanges (1 Cir.), 172 F. 2d 37, 43, this is true only where the defendant's contribution is substantial and shown by the evidence. Here the court found, on the evidence submitted, that the wrongful conduct for which Associated is chargeable contributed not at all to appellants' poor business showing in 1952 or later years.

The evidence on the basis of which this finding was made is in conflict. The credibility of one of appellants' principal witnesses was also drawn into question because of the contradiction between his oral testimony and the letters he and others had written for Prentice. The trial court resolved this conflict and question of credibility in favor of Associated. The findings of fact which resulted were not clearly erroneous.

In reaching this conclusion, we have taken into consideration the fact that, in the prior hearing, and

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been damaged by the defendant's price cutting was affirmed. But the court there stated that it was applying 15 U.S.C.A., § 13(b), a provision of the Robinson-Patman Act. This section provides that, upon proof being made that there has been discrimination in the matter of prices, services, or facilities, the burden of rebutting "the prima facie case thus made" by showing justification shall be upon the defendant. No such statute is involved in the instant case. Moreover, there was not, in that case as there is here, substantial evidence contradicting the plaintiff's theory of causation.

on two different occasions during the progress of the present hearing, the trial judge expressed the view that appellants' business stopped as a result of the circulation of the letters. When the evidence was all in, however, the judge, as he had the right to do, changed his mind as to what the evidence proves.

Since there was substantial evidence to support the final view, incorporated in the findings of fact, the circumstance that it is inconsistent with preliminary views expressed during the trial, or expressed in another proceeding which is not binding here, is without significance.

Appellants call attention to the importance which the trial court placed upon the absence of testimony by prospective customers that they had withheld custom because of the threatening letters.

This was not, as appellants urge, an indication that the court believed that, in cases of this kind, the fact or amount of damage could be proved only by such testimony. It means only that, faced in this particular case with conflicting evidence which the court thought preponderated in favor of Associated on the question of causation, the absence of direct customer-testimony which might have turned the scales the other way was considered significant enough to be noted.

This is not indicative of an erroneous view of the law of damages, but is a permissible exercise of the fact-finder's function to appraise the evidence, draw or reject inferences therefrom, and indicate the considerations which led to the view adopted.

Affirmed.

(Endorsed:) Opinion. Filed Jan. 28, 1958.
Paul P. O'Brien, Clerk.

J

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,475

E. V. PRENTICE MACHINERY COMPANY and PRENTICE MACHINERY WORKS, INC.,

Appellants,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,

Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and Entered: January 28, 1958
PAUL P. O'BRIEN, Clerk.

15 U.S.C. § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 14:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor. or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

15 U.S.C. § 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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In the Supreme Court
of the United States

OCTOBER TERM, 1957

No. 904

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Petitioners,

v.

ASSOCIATED PLYWOOD MILLS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition to Petition for a Writ of Certiorari

MANLEY B. STRAYER,
CLEVELAND C. CORY,
1410 Yeon Building,
Portland 4, Oregon,
Attorneys for Respondent.

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OPINIONS BELOW

Petitioners err in stating that the opinion of the district court in this case is reported at 113 F. Supp. 182. The reported opinion was rendered by the district court on the application of petitioner E. V. Prentice Machiner, Co. for the allowance of an attorney's fee after a favorable jury verdict in a previous declaratory judgment suit to declare certain of respondent's patents invalid.

In the case at bar, neither the opinion of the district court (R. 96-103), nor the unanimous opinion of the United States Court of Appeals for the Ninth Circuit (R. 471-480) has been reported.

STATEMENT OF THE CASE

The findings of fact made by the district court, sitting without a jury (R. 104-111), in this action under Section 4 of the Clayton Act (15 U.S.C.A. § 15) to recover treble the amount of $1,500,000.00, together with attorneys' fees and costs, are well summarized in the opinion of the court of appeals, which unanimously affirmed the final judgment of dismissal.

In essence, the record shows that petitioner E. V. Prentice Machinery Co. (hereinafter called Prentice) and respondent were engaged in selling and leasing competitive plywood patching machinery. In July of 1952, respondent's then patent attorneys sent a letter (R. 106-107) to twenty-nine of petitioner's customers demanding that they cease infringing respondent's patents by their use of the Raimann patching machine for which Prentice was the authorized sales agent.

Prentice thereupon filed a declaratory judgment suit in the Oregon federal court to have respondent's patents declared invalid and not infringed. A jury trial resulted in a verdict for petitioner. Following the trial, Prentice was successful in its application to the court for an allowance of an attorney's fee of $7,500.00. In its extensive opinion on this question, the court (R. 63-78, 113 F. Supp. 182), bound by the criteria in

Park-In-Theatres v. Perkins, 190 F.2d 137 (CA9), held that respondent had been guilty of such unfairness and inequitable conduct that it would be grossly unjust for Prentice to bear the burden of its own attorney's fee, and the court made several comments with respect to loss of business by Prentice as a result of these letters (R. 473, note 3). However, in its opinion rendered after the trial of the case at bar, the court explicitly found that these prior statements were incorrect, and were based, not upon evidence, but upon erroneous representations made by Prentice's attorneys at a time when they were resisting an application for the delay of the patent infringement suit (R. 97, 110-111).

In this subsequent action for treble damages, petitioners filed a timely demand for jury trial. However, prior to the commencement of the trial petitioners waived a jury, and respondent admitted liability in violating the antitrust laws and waived all defenses relating to the issue of its liability to petitioners, but expressly reserved the question "whether the plaintiffs sustained any damage by any act of defendant asserted or assertable in this action" (R. 105). Thereafter, the trial proceeded before the court on this "single issue" (ibid.). The testimony of sixteen witnesses was taken orally and nearly two hundred exhibits were offered and admitted into evidence.

The trial court's opinion discusses in detail some of the evidence which impelled its finding of fact that petitioners "did not suffer any damages by reason of the wrongful acts of the defendant," and that any reduc-

tion in the level of their business in 1952 and 1953 "was caused by factors other than the letter and offensive lease provisions" (R. 96-103). The decision reflects a painstaking analysis and appraisal of the documentary evidence, particularly the letters written by the Prentice brothers which directly contradicted their trial testimony (R. 100-101). The comprehensive findings of fact thereafter entered adhere closely to the trial court's opinion and likewise reflect the court's appraisal of the credibility of the Prentice brothers (R. 105-111).

The unanimous opinion of the appellate court rests upon the ground that the trial court's findings, based as they were upon conflicting evidence and an appraisal of the credibility of petitioners' principal witnesses, were supported by substantial evidence and were not "clearly erroneous" (R. 478).

ARGUMENT

I.

The record presents no substantial question of law which will govern the disposition of other cases, but merely a unique factual situation of interest only to the parties before the Court.

Petitioners appeal to this Court's discretionary power of review on the ground that unless a reversal is had, this case will stand as an effective barrier against any other private treble damage action in the Oregon federal court "because of the impossible burden of proof the District Court placed on plaintiffs in such actions" (Pet. pp. 5-6).

Contrary to petitioner's contention, the record shows that at the outset and during the trial the court was convinced that petitioners had sustained injury to their business as a result of respondent's activities (R. 125, 245). As stated by the court of appeals: "When the evidence was all in, however, the judge, as he had the right to do, changed his mind as to what the evidence proves" (R. 478).

In point of fact, the trial court placed upon respondent the burden of proving by a preponderance of the credible evidence that its acts had not caused damage to petitioners' business, and that any decline in revenues and profits was caused by other factors for which respondent was not responsible.

These factors were clearly set out by the trial court in its findings to include, among others: (A) customer dissatisfaction regarding Raimann machines, other equipment purchased from petitioners, and their sales and service policies; (B) customer dissatisfaction with the cutting dies supplied by Prentice for use with the Raimann machines, and Prentice's inability to supply dies for Raimann machines which would produce a high grade veneer patch; (C) failure of petitioners to promote sales; (D) petitioners' failure to conduct and operate their business in an aggressive and businesslike manner; and (E) fluctuations in the business level of the plywood industry which resulted in a reduced demand for petitioners' products (R. 109).

Petitioners erroneously state that ". . . it is uncontradicted that plaintiffs suffered a sharp decline in business immediately after the [antitrust] violation" (Pet. p. 2).

Quite to the contrary, the trial court found that ". . . plaintiffs' sales fell off from the year 1951 volume several months prior to the Smith & Tuck letter of July 25, 1952" (R. 110). The trial court further found: "Plywood prices and production decreased sharply before and during the period following July 25, 1952, and this industry fluctuation caused the decline in plaintiffs' business for which they seek to recover damages in this action" (R. 110).

The court of appeals has unanimously affirmed all these crucial findings of fact, and under the long-settled rule, they will be accepted by this Court without further re-examination of the evidence (*Allen v. Trust Company of Georgia*, 326 U.S. 630, 636; *United States v. Dickinson*, 331 U.S. 745, 751; *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214 [collecting cases]). Thus, this case falls under the familiar doctrine which has been well stated in *Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States" (Wolfson and Kurland Edition)*, § 310, p. 588:

> "Certiorari is not granted to review evidence and discuss specific facts; nor was that jurisdiction conferred upon the Supreme Court merely to settle matters of private interest or give the party defeated in the court below another hearing."

The asserted conflict between this case and the decisions in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, and *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251, is nonexistent. Without reviewing the facts of those cases, it is sufficient to note that this Court held in each that there was sufficient

evidence to present to the trier of fact a question of fact as to whether the alleged wrongful acts had caused damage to the plaintiffs where, as Chief Justice Stone stated in the *Bigelow* case, ". . . the decline in prices, profits and values [were] not shown to be attributable to other causes" (327 U.S. p. 264).

In the case at bar, the trial court found that any reduction in the level of petitioners' business was in fact caused by factors other than respondent's acts and that the decline commenced months before the July 25, 1952 letter. The court of appeals has held that there was substantial evidence to support this finding. That court's opinion (R. 477, note 4) shows that the cases relied upon by petitioners were thoroughly considered and distinguished on the ground that ". . . the question was not (as it is here) whether a finding against plaintiff on the question of causation (or amount of damages) is supportable, but whether a finding or verdict for plaintiff on this question may be sustained [citations]. Needless to say, a holding that the evidence is sufficient to support a finding or verdict that the established decrease in business was caused by a defendant's wrongful acts is not authority for the proposition that a contrary finding or verdict on that question must be set aside." While petitioners maintain that the court of appeals ". . . merely extracted for comment a distinction without a difference between the case at bar and those cases" (Pet. p. 6, note), the distinction is fundamental because it relates to the basic function of the trier of the facts, whether it be court or jury, to weigh conflicting evidence and appraise the credibility of the witnesses.

Petitioners beg the question by arguing that "If a plaintiff proves the amount of damage, as did petitioners, he has also proved the fact of damages" (Pet. p. 9). If, as found by the trial court, petitioners failed to show any damage, then, as a necessary corollary, they failed to prove the amount of damage. Petitioners appear to ignore the explicit language of Section 4 of the Clayton Act which gives a right of action only to "Any person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws . . ." (emphasis supplied). As stated by Mr. Justice McKenna in *Virtue v. Creamery Package Manufacturing Company*, 227 U.S. 8, 24: "To justify recovery, therefore, injury must result from something forbidden or made unlawful by the act . . ."

Thus, this case is analogous to the decision in *Buckeye Powder Co. v. E. I. DuPont de Nemours Powder Co.*, 248 U.S. 55, in which this Court, on a writ of error, affirmed a jury verdict for defendant which had been sustained by the court of appeals. In that case, Mr. Justice Holmes succinctly stated (at p. 65):

> "The defendant put in evidence tending to show that its conduct was not the cause of the plaintiff's failure, and its evidence, or the weakness of the plaintiff's, prevailed."

II.

The courts below did not err in refusing to apply the doctrine of collateral estoppel.

The record on this point has been summarized (ante pp. 2-3). The trial court and the court of appeals rejected petitioners' argument that statements in the attorney's fee opinion should be binding upon respondent in this subsequent treble damage action, where, after considering all the evidence, the court held that these prior statements with respect to damages sustained by petitioners were incorrect and were based upon erroneous representations made by petitioners' attorneys in the prior proceeding (R. 110-111, 473-474).

As noted above, the district court followed the criteria stated in *Park-In-Theatres v. Perkins*, 190 F.2d 137 (CA9), that an exercise of discretion in favor of an allowance of an attorney's fee ". . . should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party, or some equitable consideration of similar force . . ." making it grossly unjust that the winner bear his own attorney's fee. Obviously, whether or not petitioners lost sales or were damaged was not essential to support the ultimate finding of "unfairness and inequitable conduct" upon which the trial court based its decision (R. 78). An award was justified irrespective of resulting injury, which was relevant, if at all, only to show the alleged consequences of respondent's inequitable conduct.

At best, the fact of injury was merely an evidentiary or "mediate" fact in the attorney's fee proceeding, rather

than an "ultimate fact," under Judge Learned Hand's definition in *The Evergreens v. Nunan*, 141 F.2d 927, 928 (CA2), cert. den. 323 U.S. 720, which has been recently followed by this Court in *Yates v. United States*, 354 U.S. 298, where Mr. Justice Harlan held (at p. 338): "So far as mere evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative." The *Yates* case is in accord with prior authority holding that the principle of collateral estoppel is not applicable to points considered collaterally or incidentally in a previous proceeding between the parties on a different cause of action (*Norton v. Larney*, 266 U.S. 511; *North Carolina R. Co. v. Story*, 268 U.S. 288; and see: *Hopkins v. Lee*, 6 Wheat. 109; *Smith v. McCool*, 16 Wall. 560; 2 *Freeman on Judgments*, § 690, 697, pp. 1457-1460, 1474-1478 [collecting cases]).

In view of the settled rule, it is not surprising that petitioners make no claim that either the decision of the district court or the court of appeals on the "collateral estoppel" point was in conflict with decisions of this Court or of other courts of appeal.

CONCLUSION

Petitioners' contention that this decision is a manifestation of "the continuing trend of hostility in the Ninth Circuit towards antitrust litigation" (Pet. p. 11) is merely the unsupported opinion of disappointed and dissatisfied litigants. Petitioners have had their full day in court to litigate their private grievances against respondent. All the evidence, oral and documentary, has been fully considered by two federal courts.

On the record before this Court, there is no substantial legal question of public importance relating to the administration of the antitrust laws, but only petitioners' last desperate attempt to secure a further review of a most unique and complicated mass of testimony and other factual data.

On the grounds above stated, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

MANLEY B. STRAYER,
CLEVELAND C. CORY,
1410 Yeon Building,
Portland 4, Oregon,
Attorneys for Respondent.